SUPREME COURT, U. S.

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Supreme Court of the United States

October Term, 1967

No. 1355

BEDDING, CURTAIN AND DRAPERY WORKERS UNION, LOCAL 140 OF THE UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner respectfully prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit entered herein on February 13, 1968, enforcing a cease and desist order of the National Labor Relations Board and dismissing the petition for review.

Opinions Below

The opinions of the Court of Appeals and the National Labor Relations Board, as yet unreported, are appended hereto, *infra*, at pp. 1a-23a and pp. 26a-38a, respectively. The intermediate report of the Trial Examiner is appended hereto, *infra*, at pp. 39a-55a.

Jurisdiction

The decree of the Court of Appeals was made and entered on February 13, 1968, and is appended hereto, *infra*, at pp. 24a-25a. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Does peaceful consumer picketing of multi-product retail stores, appealing to the public to refrain from purchasing non-union furniture and furniture which does not carry a union label, "threaten, coerce or restrain" the retailer within the meaning of §8(b)(4)(ii)(B) of the National Labor Relations Act as amended, 29 U.S.C. §158(b)(4)(ii)(B) (hereinafter the Act)?

2. If §8(b)(4)(ii)(B) of the Act does prohibit such picketing, does the statute constitute an abridgement of speech in violation of the First Amendment?

3. Was the Board's finding that the petitioner sought to "threaten, coerce or restrain" the retailers supported by substantial evidence on the record considered as a whole?

4. Was the Board's finding, that an object of the petitioner's consumer picketing was to force the retailers to cease doing business with a particular manufacturer, supported by substantial evidence on the record considered as a whole?

Constitutional and Statutory Provisions Involved

Section 8(b)(4)(ii)(B) of the Act, in relevant part, reads as follows:

> "(b) It shall be an unfair labor practice for a labor organization or its agents . . .

(4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: . . .

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution."

Statement of the Case

The petitioner is a trade union representing bedding, curtain and drapery workers in the New York City area and is a member of the Metropolitan District Council of the United Fur-

niture Workers of America, AFL-CIO (hereinafter UFW) (T. 125-130).*

In the fall of 1962, the Metropolitan District Council, through its local unions, undertook a campaign of consumer picketing aimed at increasing the sale of bedding, upholstery and furniture produced in UFW shops in and about New York City and inducing retailers to display merchandise made in these shops (T. 125-132).

The stores were selected pretty much at random and included large department stores such as R. H. Macy and Abraham & Strauss, as well as numerous smaller bedding and furniture retailers, among them the three retailers who testified in this case (T. 128-132, 160-168, 179-181). Both the department stores and the smaller retailers stocked and sold merchandise produced by a variety of New York City and out-of-state manufacturers, of whom some were UFW shops, some were under contract with other unions and some were unorganized *(ibid.)*.

Local 140 has actively participated in this campaign since its inception (T. 129-130). Its policy has been to respond to a slackening in demand for UFW goods and the threat of layoffs with consumer picket lines in front of such randomly-selected retail shops (T. 129-131, 167-170). The placards read:

Appeal To The Public
Please Do Not Buy
Non-Union
Furniture
Upholstery & Bedding

---

*References to "T" are to the transcript of the proceedings before the Trial Examiner.

Look For This Union Label
When Buying Furniture
Upholstery & Bedding
[UFW Label]
United Furniture Workers
Of America
AFL-CIO

The petitioner nomrally avoided prior contact with the management of the picketed shop and usually postponed any preliminary inquiry about the goods on display until the management asked about the picket line (T. 155, 184-188). At that point, as the Trial Examiner found:

> "[t]he store owner would be told he was selling non-union bedding or bedding without a union label. If he sold union bedding the pickets were withdrawn, if he was selling non-union bedding and agreed to discontinue or to diminish his purchases of non-union products the pickets were then withdrawn." *Infra* at p. 42a.

In reversing the Trial Examiner and finding that the petitioner had violated §8(b)(4)(ii)(B) of the Act, the Board ignored all of the picketing for the three years prior to October, 1965, and focused on the consumer picketing for two or three weeks during the Fall of 1965, of only three New York City retailers, Modern Stores, Inc., Finkenberg's Furniture Company, Inc., and Wucker Furniture Company (hereinafter "the retailers"). The common factor with respect to these retailers is that they each stocked or displayed a substantial amount of bedding produced by U. S. Mattress of Irvington, New Jersey, whose employees were represented by a local not affiliated with the UFW (T. 27, 37-38, 88-89, 100-101).

Petitioner asserts that the record shows the following:

First, each retailer was informed by the petitioner either before or after picketing began that the petitioner desired the retailers (1) to purchase more bedding produced by firms whose workers it represented (T. 19-21, 32, 35-36) and (2) to display such merchandise with a UFW label (21-22, 34, 35-36);

Second, although the Board found otherwise, the undisputed evidence in the record supports the finding that the picketing was stopped when the retailers promised to carry and display more UFW labelled merchandise (T. 110-114, 130-135, 146-149);

Third, there is no evidence of any kind in the record to indicate that the petitioner was involved in a primary labor dispute, or, for that matter in any labor-management relationship with U. S. Mattress for at least three years prior to the consumer picketing of the retailers (T. 9-12).

It is upon these facts that the Trial Examiner concluded that "[t]he sole purpose of the picketing was to increase the sale of union made and union labelled bedding as against non-union bedding." *Infra* at p. 46a.

Local 140 filed a petition to review the order of the Board pursuant to §10(f) of the Act in the Court of Appeals for the Second Circuit. That court in a decree entered on February 13, 1968, enforced the Board's order, holding, with Judge Kaufman dissenting, that petitioner's picketing threatened, coerced and restrained the three retailers to cease doing business with U. S. Mattress and thereby constituted a secondary boycott prohibited by §8(b)(4)(ii)(B).

Reasons Relied on for the Allowance of the Writ

1. This case presents to this Court, for the first time, the question of whether consumer picketing of a multi-product retail store, not arising out of a primary labor dispute, and having as its

sole purpose the preservation of work opportunities for the members of the picketing union (a form of picketing hereinafter referred to as "work preservation picketing") is a violation of the ban on secondary boycotts contained in §8(b)(4)(ii)(B).

The decision of the court below rests on the conclusion that the picketing by the petitioner was "aimed at inducing a generalized loss of patronage" by the retailers, *infra* at p. 15a. We agree with Judge Kaufman in dissent below, that this conclusion is not supported by substantial evidence, see *infra* at p. 19a, and that "there is no reason to question that the picket signs correctly reflected the union's objective – to induce consumers to purchase more union made products", *infra* at p. 23a.

Furthermore, in drawing its conclusion the Court of Appeals placed an unduly restrictive interpretation on the doctrine of the *Tree Fruits* decision (*NLRB* v. *Fruit & Vegetable Packers*, 377 U.S. 58), which was tantamount to a ruling that work preservation picketing was unprotected by this doctrine. In the *Tree Fruits* case, this Court held that the ban of Section 8(b)(4)(ii)(B) was limited to picketing which carried an appeal to the public not to trade at all with the secondary employer and which was instituted for the purpose of forcing the secondary employer to cooperate with the union in its primary dispute. *Id.* at 63. This statutory interpretation was expressly predicated upon the "concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment". *Ibid.*

Tree Fruits was a boycott on struck products; it did not call upon the public to boycott the retailer. This Court held that such picketing did not "threaten, coerce, or restrain" the retailer within the meaning of subsection (ii) of §8(b)(4). *Id.* at 71.

Exactly the same conclusion should follow here. Work preservation picketing has the same limited objective and permissible effect as struck product picketing. In the present case, as in *Tree Fruits*, the Union sought only to encourage the purchase of certain merchandise in which it had a *bona fide* economic interest, not to boycott the retail establishment. Any decrease in the purchase of the boycotted employer's product by the retailers, in this case, is the normal incidental result of the petitioner's lawful pressure on non-union merchandise.

The court below, in affirming the Board's rejection of the Trial Examiner's report, found the petitioner's picketing to be coercive in that it was "aimed at inducing a generalized loss of patronage" in violation of §8(b)(4)(ii)(B). This finding was based on three conclusions: (i) "U.S. Mattress was an object of the Union's activity" though not identified as such on the placards, (ii) "the appeal to look for the label was not specific enough in identifying the boycotted product or company" and (iii) in asking customers not to buy non-union furniture, upholstery and bedding, the petitioner instituted a "far broader appeal than required to boycott the products of U.S. Mattress, a bedding manufacturer only." *Infra* at p. 15a.

The absence on the placards of a specifically identified product (bedding) and manufacturer (U.S. Mattress) caused the court below to conclude that:

> "the consumer picketing here failed to isolate the dispute and was thus closer to an appeal 'to shut off all trade with the secondary employer' than to picketing 'which only persuades his customers not to buy the struck product'." *Infra* at p. 15a-16a.

But in conditioning the legality of consumer picketing against non-union merchandise on (i) specification on the plac-

ard of the boycotted goods and manufacturer and (ii) the existence of a primary labor dispute with the producer at the time of the picketing, the court below, in effect, held that work preservation picketing was a proscribed boycott. Such picketing does not usually involve a specific product, or a contemporaneous primary labor dispute. Its essence is that there are no particular manufacturers with which the picketing union has a labor dispute, and hence there may be no manufacturers or products which can be specified on the placard.

2. Even if the Board's conclusion, that petitioner's picketing was directed at U.S. Mattress, was supported by the record, we would still argue that its order was improper. Whatever the petitioner's motive, the picket line did not "threaten, coerce, or restrain" the retailer to any degree whatsoever and hence no violation of the Act can be found.

The error of both the Board and the court below was to confuse the two elements of §8(b)(4)(ii)(B): the prohibited object and the prohibited means. The court uses what it deems the object of the picketing – the cessation of business dealings between the retailers and U.S. Mattress – to transform the placards from an express appeal to purchase UFW goods into an assumed appeal not to patronize the retail stores.

But the placards are not susceptible to any such interpretation. Clearly, the nature of an appeal by pickets to consumers can be found only from the placard as viewed by the consumer. Whatever the unexpressed motives of the union, as far as the consumer was concerned, the petitioner's communication was merely a request that he refuse to purchase non-union goods and look for the union label. If anything, the picketing encouraged the consumer to enter the store by its clear inference that the retailer was carrying union-made and labelled goods which

the consumer could select from among non-union goods. The petitioner's placards, therefore, on their face and in their reasonably anticipated effect, do not constitute the means proscribed by §8(b)(4)(ii)(B).

So Judge Kaufman concluded:

> "On their face, the signs carried by Local 140 were clearly designed to do what the majority refuses to condemn as illegal – to induce the public to purchase union-made products." *Infra* at p. 19a.

The court below does not cite any cases directly in point, nor are there any. Instead, it cites as "analogous", cases, *infra* p. 16a, which involve picketing based on intangible services rendered by union members to the secondary employer and never offered to the public, *NLRB* v. *Building Service Employees*, 367 F. 2d 227 (10th Cir. 1966) (janitorial service for bank) or component parts supplied to the secondary employer for incorporation into a substantially different product for public sale, *NLRB* v. *Millmen and Cabinet Makers Union*, 367 F. 2d 853 (9th Cir. 1966) (lumber supplied to building contractor). In both cases, as in the other case cited, *NLRB* v. *Local 25, IBEW*, 383 F. 2d 449 (2d Cir. 1967), the picketing was aimed at the employees of the secondary employer; the cases have no relationship at all to this case.

3. To establish an 8(b)(4)(ii)(B) violation, the Board must not only show illegal means, but also that the petitioner's conduct constituted a secondary boycott. On the record, petitioner's conduct did not arise from a primary labor dispute or, indeed, any dispute at all.

> "A boycott to be secondary must be predicated upon a dispute that is primary." *Big Apple Supermarkets, Inc.* v. *Dutto*, 237 F. Supp. 774, 778 (E.D.N.Y. 1965).

It is a well established principle that the statutory concept of the "'secondary boycott' should be narrowly construed," *Douds* v. *International Brotherhood of Teamsters*, 139 F. Supp. 702, 711 (S.D.N.Y. 1956) for the Congress did not intend that all secondary boycotts were to be outlawed, *Electrical Workers* v. *NLRB*, 366 U.S. 667, 672-73. As Mr. Justice Brennen points out in the *Tree Fruits* case, the legislative history of Section 8(b)(4)(ii)(B) shows that the "isolated evil" sought to be proscribed by Congress was the use of consumer picketing "to persuade the customers of secondary employers to cease trading with him in order to force him to cease dealing with, or to put pressure on, the primary employer." *NLRB* v. *Fruit Packers, supra,* 63. See also *NLRB* v. *Servette,* 377 U.S. 46, 52-53; *NLRB* v. *Building Service Union*, 367 F. 2d 227 (10th Cir. 1966) and *cf. NLRB* v. *International Longshoremens Association,* 332 F. 2d 992 (4th Cir. 1964).

The inability of the court below to recognize that work preservation picketing is in its nature distinct from struck product picketing leads the court mechanically to accept the Board's finding that "U.S. Mattress . . . stood in the position vis-a-vis Respondent (Local 140) of a primary disputant." *Infra* at p. 31a. The court reasons in circuity from effect to cause to effect. First, the court finds that the petitioner's picketing was likely to affect the dealing between U.S. Mattress and the retailers. Second, this effect is used as evidence of the petitioner's motives. Translating motives into objects, the court makes the third finding that the petitioner had a primary labor dispute with U.S. Mattress.

The record in this case discloses not one word of evidence to support this reasoning. We agree with Judge Kaufman, that

> "[u]nlike the union in Tree Fruits, Local 140 is not striking against any primary employer. Local 140 lost

a representation election at U.S. Mattress in March 1962—3½ years before the picketing in this case—but the record is wholly devoid of any suggestion that it is now seeking to represent U.S. Mattress' employees who are affiliated with another union." *Infra* at p. 17a, ftn. 1.

4. The decision of the Court of Appeals in this case is in direct conflict with the decision of the Court of Appeals for the Eighth Circuit in *NLRB* v. *Upholsterers Frame and Bedding Workers*, 331 F. 2d 561 (1964). That case, decided immediately after the decision of *Tree Fruits*, involved exactly the same kind of picketing as that engaged in by the petitioner. Essential to the Eighth Circuit's ruling that work preservation picketing was not prohibited by the act was the fact that the placards "did not contain an appeal to any person not to buy any product or not to patronize any store." *Id.* at 562-563. See also *Big Apple Supermarkets, Inc.* v. *Dutto, supra.* The court below sought to distinguish the Eighth Circuit's decision by the fact that the union there distributed leaflets which set forth the names of local union manufacturers, suggesting that if such had been the practice here the result would have been different. But this is not a distinction made by the Eighth Circuit. On the contrary, in that case the court said at p. 563, "There is no sound factual basis for distinguishing the legitimate publicity features or the object of the handbills from that of the placards carried by the pickets." The court, quoting at length from the *Tree Fruits* decision, found that the picketing was lawful quite independently of the distribution of the leaflets. In the *Big Apple* case, likewise, no point was made of the fact that leaflets were given out by the pickets.

5. The ban on picketing enforced by the court below has resulted in the "outlawing [of] free discussion of one side of a

certain kind of labor dispute." *NLRB* v. *Fruit Packers, supra* at p. 79 (Mr. Justice Black concurring). This ruling cannot be sustained as a permissible regulation of picketing.

Picketing is composed of two elements: patrolling and speech. *Tree Fruits, supra* at p. 77 (Mr. Justice Black concurring). See Mr. Justice Douglas concurring in *Bakery & Pastry Drivers* v. *Wohl*, 315 U.S. 765, 775; *Hughes* v. *Superior Court*, 339 U.S. 460, 464. See also Cox, *Strikes, Picketing and the Constitution*, 4 Vand. L. Rev. 574, 592-602 (1951). Patrolling is conduct, which in a labor relations context has a symbolic character. A patrol in front of a store may be a signal to workers to cease work and to patrons to cease trading with this employer.

But when the patrolling is combined with and dominated by a communication, as in this case, publicizing the facts of a labor issue, it must be regarded as speech guaranteed by the First Amendment. *Thornhill* v. *Alabama*, 310 U.S. 88, 102. There is no element of coercion in petitioner's appeal here. A consumer may cross the picket line without incurring the pickets' disapproval; the union does not in any respect bring to bear the special psychological pressure peculiar to it as a labor organization and which has induced the legislature to prohibit certain kinds of picketing.

If Section 8(b)(4)(ii)(B) be read as prohibiting patrolling generally – if it is aimed at picketing which publicizes the facts of a labor dispute and induces the consuming public to conduct a legal boycott – it abridges speech in violation of the First Amendment.

6. The court below erroneously affirmed the Board's finding that the petitioner violated §8(b)(4)(ii)(B). None of the Board's findings on the elements of an 8(b)(4)(ii)(B) violation,

i.e., (i) an illegal object, (ii) an illegal means, and (iii) a primary labor dispute, was supported by substantial evidence on the record considered as a whole.

The difference between the Trial Examiner's findings and those of the Board relate entirely to questions of fact involving the credibility of witnesses. Hence, this is a case where the Board should take special cognizance of the dissimilarity in the findings of the Board and the Trial Examiner

> "who alone had the opportunity to observe the demeanor of the witness and to appraise the sincerity of the union's proclaimed object see *NLRB* v. *Local 3, Bloomingdale, etc.*, 216 F. 2d 285 (2d Cir. 1954), concluded that there was no evidence that the union officials did not make clear that they wanted the stores to carry more union produced merchandise." *Infra* at p. 19a-20a.

Object

Section 8(b)(4)(ii)(B) makes it an unfair labor practice for a union "to threaten, coerce, or restrain any person," with an object of "forcing . . . any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer . . . or . . . person." The Trial Examiner, after hearing the witnesses and determining their credibility, concluded that there was "no evidence that either Carrion [union business agent] or Sirota [union president] demanded that any of the three stores discontinue U.S. Mattress merchandise", *infra* at p. 53a.

The Board specifically overruled this finding and the court below affirmed even though it found that "the issue is a close one", *infra* at p. 15a. According to the Board the "real object" of the union was "to force a cessation of business dealings be-

tween the picketed retailers and . . . 'non-union' manufacturers," specifically U.S. Mattress. *Infra* at p. 30a.

The testimony relied on by the Board was taken out of context or misstated; when read in its entirety, the Board's conclusions are plainly unfounded.

a. The testimony of Mrs. Lieboff of Modern that Carrion told her, after inspecting the mattresses displayed, that she carried "too much U.S. Mattress" was followed by a clear statement, as narrated by Mrs. Lieboff, of the Union policy:

> "He said, 'Well, you don't buy enough from Brooklyn firms and we want you to buy from Brooklyn firms.'
>
> I said, 'Who are you to tell me?' I was angry at that time, to tell me who to buy from.
>
> He says, 'Well, all I can tell you is I am going to throw a picket line.'
>
> I said, 'What for?'
>
> He says, 'Because I want you to buy more from the Brooklyn firms.'" (T. 19-20.)

U.S. Mattress was mentioned for an obvious reason: at least 75% of the mattresses on display in Modern were, in fact, U.S. Mattress products – manufactured in New Jersey by a non-UFW union (T. 37, 52-53).

b. In reporting a conversation between Sirota and himself, Mr. Portnoy of Modern also made it clear that the object of the picketing was the purchase and display of Local 140 bedding.

Q. Was there anything said with respect to any action you might take to get rid of the pickets?

A. I asked him what I had to do to rid myself of this nonsense. He said, 'Well, the only thing I can suggest is that you have union label merchandise on your floor' (T. 37).

Portnoy thereupon promised to buy and display *more* – not "only" as the Board concluded – Local 140 bedding (T. 37).

c. The Board states that "[n]ot long thereafter Respondent terminated its picketing of Modern's store." *Infra* at p. 29a. The implication of this finding is clear but the fact is untrue. Picketing at Modern, which lasted a total of only two and a half or three weeks, continued well over a week after this conversation with Portnoy (T. 24, 48-50).

d. The record does not disclose any promise, by the owners of Wucker's and Finkenberg's to the Union, that they would "cease doing business with U.S. Mattress." The owners testified that they told this to Frank Schaeffer, who, on the request of the owners, sought to intervene with the union (T. 78-79, 95-96). Schaeffer, a Board witness, denied having had any such conversation (T. 112-113, 115-120), but even if such a promise were made, there is no evidence at all that it was ever relayed to the union and certainly never accepted by the union. Sirota told Schaeffer that he wanted the stores to carry more merchandise with the union labels – exactly what he told the manager of Modern, what Carrion told Mrs. Lieboff, what the picket signs said (T. 132-133, 140-141, 146-147, 149-150).

It is important to note that five days of picketing at Finkenberg's out of a total of eight occurred after, not before

the alleged "promise" of the owners to Schaeffer (T. 80-81). Picketing of these retailers was permanently discontinued only after a meeting between Sirota, Schaeffer and Maurice Friedman, attorney for the Retail Stores Association, at which an agreement was reached in regard to the stores' display of union-made and union-labelled merchandise (T. 132-135). Nothing was said at this meeting about U.S. Mattress products (T. 134).

e. The Board rejected the union's position that the object of its picketing was to educate the public to look for the union label. The Board makes much of the disputed fact, which Judge Kaufman termed of "little significance", that in these three stores none of the goods on display had union labels, so that the effect of the picketing was to ask the public to refrain from purchasing anything at the store being picketed. This may have been the *effect* of the picketing of these three stores, among the many which were picketed, but there is nothing to suggest such was its *purpose*; the stores could have remedied the situation overnight by securing union labels and affixing them to merchandise actually purchased from Local 140 shops – a remedy at least one of the shops (Modern) did avail itself of (T. 29). The Board concedes that picketing at Finkenberg and Wucker preceded any inspection of the premises by the union, *infra* at p. 29a; the union, therefore, could not know of the lack of labels on merchandise in these retail shops, and certainly had no reason to believe that this merchandise was delivered by the manufacturer without union labels in violation of the collective bargaining agreement (T. 73).

f. The fulcrum of the Board's conclusion that U.S. Mattress was the object of the picketing is the finding that the union and U.S. Mattress were engaged in an ongoing primary labor dispute. *Infra* at pp. 31a, 34a. But the record is most

clear on this point; there is no evidence that Local 140 has had any interest in U.S. Mattress since it lost an election in that shop in March, 1962, three and a half years before the picketing in this case, and there is no suggestion of any organizational activity of any sort since that date.

Proceeding from its unsupported assumption, the Board argues that, in order to promote its collective bargaining interest in the U.S. Mattress shop, the union picketed with signs that do not even mention U.S. Mattress but refer instead to all goods which do not carry a union label. But if the union had the objective assumed by the Board, it would have furthered it much more effectively by referring to U.S. Mattress on its signs. Further, the Board candidly admits that such direct reference would have been squarely within the protection of the *Tree Fruits* case. *Infra* at p. 34a. So the Board is compelled to argue that Local 140 chose a devious, ineffective and illegal method of accomplishing its purpose, which could have been accomplished directly, effectively and legally. It is not surprising that the Board can give no reason why the union should have acted so irrationally.

Means

We agree with Judge Kaufman that the Board's conclusion "that the picketing was 'aimed at inducing a generalized loss of patronage by the three retailers' . . . is reached by a tortuous route," *infra* at p. 22a.

The Board, attributing to the Union an object it denies – forcing cessation of dealing between U.S. Mattress and the retailers – "fault[s] the union for picketing with signs that did not reflect this alleged intent," *infra* at p. 22a. Again, the union is faulted for asking the public to look for the union

label when, although this fact is in dispute, Local 140 merchandise displayed by the retailers did not have a union label.

Notwithstanding these findings, all of which were carefully analyzed and found wanting by Judge Kaufman, the evidence considered and held determinative by the Board of the issue of whether the union utilized forbidden means, is completely irrelevant to the standard established by *Tree Fruits*. That standard, as applied to consumer picketing, requires a finding that the Union's appeal was designed to persuade customers "not to trade *at all* with the secondary employer." *NLRB* v. *Fruit Packers*, *supra* at 63, 71 (emphasis added).

Thus, the only relevant facts are the words on the placard and the fair inference that may be drawn from them. Unquestionably those words on their face do not request, induce, persuade, or cajole any consumer into refusing to cross the picket line or enter the store. There is no evidence on the record that any consumer believed that the placards called for a general boycott.

It is apparent that the Board was preoccupied with the degree of injury likely to be suffered by the retailers as a result of the petitioner's broad appeal. Yet even in this regard the Board is inconsistent. The Board candidly conceded that the same degree of injury would be likely to result and would be lawful if U.S. Mattress or any other producer had been specifically identified on placards. The ban on picketing imposed by the Board violates this Court's injunction in *Tree Fruits* that "[a] violation of 8(b)(4)(ii)(B) would not be established, merely because [petitioner's] picketing was effective" in accomplishing its concededly legal and diversified objectives. *Id.* at 72.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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Leonard B. Boudin,

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April 23, 1968

Opinion of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 134—September Term, 1967.

(Argued December 11, 1967 Decided January 19, 1968.)

Docket No. 31398

BEDDING, CURTAIN AND DRAPERY WORKERS UNION, LOCAL 140 OF THE UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Before:

KAUFMAN, ANDERSON and FEINBERG,

Circuit Judges.

Petition to review and cross-petition to enforce decision of National Labor Relations Board that Bedding, Curtain and Drapery Workers Union, Local 140, violated section 8(b)(4)(ii)(B) of the National Labor Relations Act, 29 U. S. C. §158(b)(4)(ii)(B), and ordering the union to cease and desist from threatening or coercing three retail stores. Board order enforced.

VICTOR RABINOWITZ, New York, N. Y. (Rabinowitz & Boudin, Leonard B. Boudin, Lee A. Albert, on the brief), *for Petitioner.*

ALLISON W. BROWN, JR., Attorney, National Labor Relations Board (Arnold Ordman, General Counsel; Dominick L. Manoli, Associate General Counsel; Marcel Mallet-Prevost, Assistant General Counsel; Joseph C. Thackery, Attorney, on the brief), *for Respondent.*

FEINBERG, *Circuit Judge*:

The Bedding, Curtain and Drapery Workers Union, Local 140 of the United Furniture Workers of America, AFL-CIO, seeks review of an order of the National Labor Relations Board. The Board's decision and order, reported at 164 N. L. R. B. No. 27, found that Local 140 had violated section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended, 29 U. S. C. §158(b)(4)(ii)(B), by picketing three furniture stores with an object of forcing them to cease doing business with a bedding manufacturer. Upon a review of the record, we find that there is sufficient evidence to support the Board's findings and reject petitioner's other arguments against enforcement of the Board's order. Accordingly, we deny the union's petition and grant the Board's cross-petition for enforcement.

The retail stores in question are Modern Stores, Inc., Finkenberg Furniture Co., Inc., and Wucker Furniture Co.; all are located in New York City and sell various types of furniture, including bedding. The bedding manufacturer

against whom the Board found the union's activities were directed is U. S. Mattress Corp., located in Irvington, New Jersey. In the fall of 1965, when the events complained of occurred, U. S. Mattress furnished seventy-five per cent of the bedding sold by Modern and supplied the other two stores as well. The production and maintenance employees of U. S. Mattress were represented by Teamsters Local 418, which had been certified by the Board in 1962 after an election in which petitioner Local 140 also appeared on the ballot. The Board's discussion of Local 140's activities embraced all three stores, but focused primarily on Modern; we turn directly to the events affecting it.

According to the evidence before the Board and its findings: On October 1, 1965, Enio Carrion, a Local 140 business agent, walked into Modern and inspected its supply of mattresses. When Mrs. Leiboff, one of Modern's owners, asked what he was looking for, Carrion told her that she carried "too much of U. S. Mattress." When Mrs. Leiboff pointed out that she also carried other brands, Carrion stated, "Well, U. S. doesn't belong to our union." Carrion then told Mrs. Leiboff the names of various manufacturers whose employees were represented by Local 140; Mrs. Leiboff pointed out that two of them were suppliers of Modern. Carrion replied, "you don't buy enough from Brooklyn firms." When Mrs. Leiboff bridled at this, Carrion said, "Well, all I can tell you is I am going to throw a picket line . . . . [b]ecause I want you to buy more from the Brooklyn firms." He told Mrs. Leiboff to call Alex Sirota, the president of the Local, and left.

True to the business agent's word, about a week later two pickets appeared; they patrolled in front of Modern each day from 9:30 to 4:30 carrying signs with this legend:

APPEAL TO THE PUBLIC
PLEASE DO NOT BUY
NONUNION
FURNITURE
UPHOLSTERY & BEDDING
LOOK FOR THIS UNION LABEL
WHEN BUYING FURNITURE
UPHOLSTERY & BEDDING

[UFW LABEL]

UNITED FURNITURE WORKERS OF AMERICA
AFL-CIO

After the picketing began, Carrion returned. For the first time, he told Mrs. Leiboff that Modern's merchandise did not have union labels. She pointed out to him that even the bedding supplied by the two Local 140 shops had no such label. While Carrion was just outside the store, Mrs. Leiboff called one of these suppliers to request union labels. The latter suggested that Carrion be put on the phone; however, Carrion refused to come back into the store and talk to him.

After two weeks of picketing, Sol Portnoy, Mrs. Leiboff's partner, spoke to Sirota, the president of Local 140. Sirota explained that Modern was being picketed "because of the non-union shops." Actually, all of Modern's four suppliers of bedding had contracts with unions: two of them with Local 140, as Carrion had been told, the third with another local of United Furniture Workers of America, Local 140's parent body, and the last (U. S. Mattress) with a Teamster local, as indicated above. Portnoy asked how long Modern would be picketed; Sirota replied that "it could be two weeks, two months or two years." Portnoy got the message and said that if "buying from FW [furniture workers]

shops is what we had to do to rid ourselves of the pickets," he would follow that course. Thereafter, even though U. S. Mattress was its major supplier of bedding, Modern stopped buying from it. About a week later, the picketing in front of Modern stopped.

The picketing at the other two stores, Wucker and Finkenberg, took place in early November. Except for bedding produced by U. S. Mattress and one minor item of merchandise,[1] all the bedding displayed at these stores was also manufactured by Local 140 or a sister local. The picketing at Wucker and Finkenberg began without prior warning or investigation; shortly after their owners promised to stop doing business with U. S. Mattress, the picketing stopped. At the Finkenberg store it did resume several days later and continued for four or five days.

On November 9, 1965, U. S. Mattress filed an unfair labor practice charge against Local 140. In December 1965, the Regional Director petitioned the United States District Court for the Southern District of New York for a temporary injunction against Local 140, pursuant to section 10(l) of the Act, 29 U. S. C. §160(l). In March 1966, the relief sought was obtained from Judge Metzner.[2] Meanwhile, hearings were held before the Board on the complaint of the Regional Director; in April 1966, the trial examiner recommended dismissal of the complaint. However, Judge Metzner refused to reconsider his decision granting a temporary injunction because "The preliminary determination by the trial examiner does not afford the court the guidance and weight that a decision by the Board

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1 A chair bed, but purchases of this item were minimal. Finkenberg also purchased some bedding from a self-employed individual.

2 *McLeod* v. *Bedding, Curtain & Drapery Workers Union, Local 140*, No. 65 Civ. 3788 (E. D. N. Y. Mar. 31, 1966).

would."[3] Thereafter, the Board disagreed with the trial examiner; in May 1967, on the foregoing facts, it concluded that Local 140 had violated section 8(b)(4)(ii)(B) of the Act.

That section provides, in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> • • • • • •
>
> (4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> • • • • • •
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . .

The section was part of the 1959 Landrum-Griffin amendments[4] to section 8(b)(4) of the Taft-Hartley Act.[5] The

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3 *McLeod* v. *Bedding, Curtain & Drapery Workers Union, Local 140,* No. 65 Civ. 3788 (E. D. N. Y. May 3, 1966).

4 Labor-Management Reporting and Disclosure Act of 1959, §704(a), 73 Stat. 542-43, 29 U. S. C. §158(b)(4).

5 Labor-Management Relations Act, 1947, §8(b)(4), 61 Stat. 141-42.

amendments were a continuation of congressional efforts to circumscribe union pressure on a neutral employer caught in the cross-fire of a dispute between the union and another employer. One of the principal targets of the Taft-Hartley Act had been the secondary boycott; a simple example of this complex concept, see Lesnick, The Gravamen of the Secondary Boycott, 62 Colum. L. Rev. 1363 (1962), occurs when a retailer (secondary employer) is compelled by a union to stop purchasing from a supplier (primary employer) with whom the union has a labor dispute. Although the 1947 Act did not define secondary boycott or even use the term, the "labyrinthine provisions" of section 8(b)(4) were designed to deal with it.[6] Thus, section 8(b)(4)(A) declared it to be an unfair labor practice for the union in the above example to "induce or encourage" the retailer's employees to strike when an object of such conduct was to force the retailer to stop doing business with the supplier. However, major loopholes still remained; one was pressure directly against the retailer himself by "threats of labor trouble," rather than inducement of his employees to strike; the latter was prohibited by the Taft-Hartley Act but the former was not. See *NLRB* v. *Fruit Packers*, 377 U. S. 58, 64 (1964); *NLRB* v. *Business Mach. Mechanics Board*, 228 F. 2d 553 (2d Cir. 1955), cert. denied, 351 U. S. 962 (1956). To remedy this, the 1959 amendments added a new subsection (subparagraph 8(b)(4)(ii) quoted above), which makes it unlawful for a union to "threaten, coerce, or restrain" any person where "an object" of the union's conduct is "forcing or requiring" that person "to cease . . . dealing in the products of any other . . . manufacturer." Thus, the prior prohibition of persuasion of *employees* of a secondary employer was expanded to pro-

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6 Aaron, The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 1086, 1113 (1960).

hibit direct pressure on that *employer*, as well. In addition, Congress also added a proviso exempting "publicity, other than picketing" from the restrictions of section 8(b)(4), as amended.[7] These and other changes in 1959 were the product of a sharp struggle between competing interests in the legislative arena. See Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 Minn. L. Rev. 257 (1959). The resulting compromises created thorny problems of statutory construction,[8] at least one of which is raised here.

In applying the language of section 8(b)(4)(ii)(B) to this case, the Board faced two questions: Was "forcing or requiring" the three retail stores to stop dealing with U. S. Mattress "an object" of the union, and did the union by its conduct "threaten, coerce, or restrain" the stores? The Board answered these questions affirmatively, reversing the trial examiner on both issues.

As to the first, the Board found that the object of the picketing by Local 140 was "to force or require a cessation of business dealings with U. S. Mattress, which stood in the position *vis-a-vis* Respondent [Local 140] of a primary disputant . . . ." The union claims that this finding was

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7 That proviso reads:

> That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services at the establishment of the employer engaged in such distribution.

8 See, e.g., Note, Picketing and Publicity Under Section 8(b)(4) of the LMRA, 73 Yale L. J. 1265, 1267 n. 16 (1964).

not supported by the evidence. It maintains that it had been engaged since 1962 with other unions in a city-wide program of consumer picketing solely to promote the sale of merchandise bearing the United Furniture Workers and related union labels, that the incidents at the three stores now involved were minor, and that the Board's emphasis upon them distorts the true picture. Thus, it points out that there was picketing at other multi-product retail stores, and had witnesses from those stores been called,[9] it would have been clear that the union's conduct was not directed at U. S. Mattress, except incidentally. But as we have pointed out before, *NLRB* v. *Suffolk County District Council of Carpenters,* —— F. 2d —— (2d Cir. 1967); *NLRB* v. *Local 182, IBT,* 314 F. 2d 53, 58 (2d Cir. 1963), whether the union's conduct had an improper "object" is a question of fact; moreover, that "object" need not be the only one. See also *NLRB* v. *Milk Drivers Local 584,* 341 F. 2d 29, 32 (2d Cir.), cert. denied, 382 U. S. 816 (1965). As with all questions of fact, the context in which the viewer chooses to resolve the issue is frequently determinative; if the substantial evidence test is met, however, we are not free to displace that point of view, even though we might not have reached the same factual conclusion ourselves. *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474, 488 (1951). In support of its finding and in response to the argument that the picketing was only to educate the public to look for a union label, the Board said:

> Quite clearly, Respondent [Local 140] had no economic interest in conducting a consumer boycott of products made by its own members. Respondent was aware when it engaged in the picketing that bedding manufactured in its own unionized shops was shipped with-

9 Local 140 implies that the Board should have called these witnesses.

out union labels. It knew from its own investigation of Modern before it picketed that store that, except for some U. S. Mattress merchandise, all bedding carried by that store was produced in its own organized shops. It was in a position to know that substantially the same was true of Wucker and Finkenberg. The singular unwillingness of its business agent, when so requested by Modern, to so much as speak to one of its organized manufacturers concerning the absence of union labels on the products markedly points up that enforcement of its union label requirements, as such, could not have been the true object of its concern.

On the contrary, Respondent's entire course of conduct was such as to leave little doubt—and we so find—that the real object of its concern was with the retailers' handling of bedding from suppliers not under contract with it, specifically U. S. Mattress, and that the target of its picketing was to force a cessation of business dealings between the picketed retailers and such "non-union" manufacturers. This, we are convinced, is abundantly demonstrated by the following: (a) Respondent's business agent's initial complaint to Modern that Modern "carried too much U. S. Mattress"; (b) his accompanying explanation that "U. S. Mattress does not belong to our Union"; (c) Respondent's explanation for the picketing of Modern during its course, that it was because Modern was "carrying non-union brand merchandise"; and (d) the fact that the picketing of each retailer ceased shortly after it had promised to discontinue its purchases of U. S. Mattress products.

Local 140 offers various other reasons why these conclusions were unjustified. Thus, it points out that if its

conduct had really been aimed at U. S. Mattress, it would have asked consumers specifically not to buy U. S. Mattress products on the signs carried by the pickets. It argues that such a sign would have been proper under the then recent decision of the Supreme Court in *NLRB* v. *Fruit Packers,* 377 U. S. 58 (1964) (hereafter referred to as *"Tree Fruits"* and discussed below). Therefore, according to Local 140, the Board attributed to it an irrational intention to choose a devious, ineffective and illegal method of accomplishing its purpose of injuring U. S. Mattress economically when it could have done so directly, effectively and legally. However, there are reasons why the Board's finding is not undermined by this argument. *Tree Fruits* was decided in 1964; the union claims that its city-wide campaign began in 1962. It is not at all improbable that the effects and complex teachings of *Tree Fruits* had not yet trickled down by October 1965 to the non-lawyers supervising or participating in picket lines. Moreover, much more economic pressure is brought upon a secondary retail employer by a generally worded picket sign than by a specific request to the public not to buy a particular product. In fact, as we point out below, this distinction forms the basis of the decision in *Tree Fruits.* We have considered all of Local 140's able arguments on this point, but we are not free to ignore the substantial evidence for the Board's finding as to "an object" of the union's picketing.

The more difficult problem in the case is whether the union's conduct amounted to unlawful restraint and coercion. Local 140 argues that it cannot be so characterized under the decision of the Supreme Court in *Tree Fruits.* In that case, a union went on strike against various fruit packers and warehousemen; the struck firms sold Washington State apples to the Safeway chain of retail stores. The

union picketed the stores, appealing to consumers by picket signs and distribution of handbills. The placards stated:

> To the Consumer: Non-Union Washington State apples are being sold at this store. Please do not purchase such apples. Thank you. Teamsters Local 760, Yakima, Washington.

The handbills expanded upon this exhortation; they also made clear that there was a labor dispute with the many firms that packed the apples, but that it was "not a strike against any store or market." [10] No appeal was made to employees, nor was there any interference with deliveries; in addition, the pickets were forbidden to request customers not to patronize the store. The Board found that the union

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10 A typical handbill read:

DON'T BUY
WASHINGTON STATE
APPLES

THE 1960 CROP OF WASHINGTON STATE APPLES
IS BEING PACKED BY NON-UNION FIRMS

Included in this non-union operation are twenty-six firms in the Yakima Valley with which there is a labor dispute. These firms are charged with being

UNFAIR

by their employees who, with their union, are on strike and have been *replaced by non-union strikebreaking workers* employed under substandard wage scales and working conditions.

In justice to these striking union workers who are attempting to protect their living standards and their right to engage in good-faith collective bargaining, we request that you

DON'T BUY
WASHINGTON STATE
APPLES

TEAMSTERS UNION LOCAL 760
YAKIMA, WASHINGTON

This is not a strike against any store or market.

(P. S.—PACIFIC FRUIT & PRODUCE CO. is the only firm packing Washington State Apples under a union contract.)

had violated the Act; it construed the 1959 amendments as banning all secondary consumer picketing.[11] However, the court of appeals refused to enforce the Board's order. Troubled by the constitutionality of the Board's broad reading of the statute, the court remanded for a finding as to whether the picketing had actually "coerced" the stores.[12] The Supreme Court, hearing the Board's appeal, was also concerned "that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." In setting aside the Board's order, it distinguished between a secondary appeal to consumers not to trade at all at a retail store and an appeal not to buy a particular product sold there. The Court held that picketing conveying the latter message is not outlawed by section 8(b)(4)(ii)(B), even though it is literally within its terms, since it is not truly coercive (377 U. S. at 71-72):

> We come then to the question whether the picketing in this case, confined as it was to persuading customers to cease buying the product of the primary employer, falls within the area of secondary consumer picketing which Congress did clearly indicate its intention to prohibit under §8(b)(4)(ii). We hold that it did not fall within that area, and therefore did not "threaten, coerce, or restrain" Safeway. While any diminution in Safeway's purchases of apples due to a drop in consumer demand might be said to be a result which causes respondents' picketing to fall literally within the statutory prohibition, "it is a familiar rule, that a thing may be within the letter of the statute and yet

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11 132 N. L. R. B. 1172, 1177 (1961). The Board relied on its earlier decision in *Upholsterers Frame & Bedding Workers*, 132 N. L. R. B. 40, 43-45 (1961), enforcement denied (after the intervening Supreme Court decision in *Tree Fruits*), 331 F. 2d 561 (8th Cir. 1964).

12 308 F. 2d 311 (D. C. Cir. 1962).

not within the statute, because not within its spirit, nor within the intention of its makers." . . . When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employers' purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer. [Footnote omitted.]

The Court emphasized the contrast at follows (*id.* at 70):

> Peaceful consumer picketing to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer, is poles apart from such picketing which only persuades his customers not to buy the struck product.[13]

Local 140 claims that the activity proscribed by the Board in this case was "product picketing of non-union

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13 Three members of the Court could not find in the statute's prohibition of conduct aimed at the secondary employer "the fine distinction . . . between general and limited product picketing." 377 U. S. at 82 (dissent of Harlan, *J.*, joined by Stewart, *J.*). Justice Black agreed with the construction of the dissenters; however, he felt that the statute so read was unconstitutional. Justice Douglas did not participate in the decision.

goods," fully protected by the rationale of *Tree Fruits*. The Board disagreed, reasoning that the picketing here "was aimed at inducing a generalized loss of patronage." While the issue is a close one, we find sufficient support for the Board's conclusion. The Board found that U. S. Mattress was an object of the union's activity—a finding which we have concluded must stand. Yet the picket signs did not specify that company or its product in the message to consumers. Local 140 argues that it "described the goods in the only way possible on a placard. It asked the public to look for its label . . . ." But the inaccuracy of that assertion is indicated even by the cases relied on by Local 140; e.g., in *Big Apple Supermarkets, Inc.* v. *Dutto*, 237 F. Supp. 774 (E. D. N. Y. 1965), the pickets apparently specifically requested customers not to buy the goods of Gourmet Company, and in *NLRB* v. *Upholsterers Frame & Bedding Workers*, 331 F. 2d 561 (8th Cir. 1964), the picketing union passed out leaflets, which stated the names of local manufacturers whose products consumers should buy.[14] Moreover, the appeal to look for the label was not specific enough in identifying the boycotted product or company. The record shows that lack of a label at these stores did not indicate non-union merchandise, which fact Local 140 clearly knew at least as to Modern. Finally, the signs asked customers not to buy non-union "furniture, upholstery & bedding," a far broader appeal than required to boycott the products of U. S. Mattress, a bedding manufacturer only. We conclude that the consumer picketing here failed to isolate the dispute and was thus closer to an appeal "to shut off all trade with the secondary employer" than to picketing "which only persuades his customers not

14 The case was decided by the Board prior to *Tree Fruits*; the court of appeals correctly concluded that the Board's proscription of all peaceful secondary picketing was, under that decision, erroneous.

to buy the struck product." Therefore, under the teaching of *Tree Fruits*, Local 140 did "threaten, coerce or restrain" the three retail stores here involved. Cf. *NLRB* v. *Millmen & Cabinet Makers Union, Local 350*, 367 F. 2d 953 (9th Cir. 1966); *NLRB* v. *Building Service Employees Union, Local 105*, 367 F. 2d 227 (10th Cir. 1966). See also *NLRB* v. *Local 25, IBEW*, 383 F. 2d 449 (2d Cir. 1967). We emphasize that we do not have here merely picketing to educate consumers to buy union-label merchandise. The Board, supported by substantial evidence, has found that the picketing had a different object, and we must accept that characterization. Therefore, we need not rule whether "union-label" secondary picketing alone could be held improper under the Act.[15] For the same reason, we also need not decide whether picketing these retailers would be a secondary boycott proscribed by the statute if its sole object was to protect the jobs of members of Local 140 in other manufacturing plants. Cf. *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U. S. 612 (1967); Lesnick, Job Security and Secondary Boycotts: The Reach of NLRA §§8(b)(4) and 8(e), 113 U. Pa. L. Rev. 1000 (1965). Such inquiries would raise fine—perhaps esoteric—distinctions with which we need not now deal.

Local 140's final argument is that the Board's order is an unconstitutional abridgement of its First Amendment rights. The distinction in the *Tree Fruits* opinion, otherwise relied on by the union, supplies the answer to that contention. While "a broad ban against peaceful picketing" might be unconstitutional, it was proper for Congress to deal with the "isolated evil" of

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15 The Board also stated that this question was not before it on this record.

> peaceful consumer picketing at secondary sites . . . to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer. This narrow focus reflects the difference between such conduct, and peaceful picketing at the secondary site directed only at the struck product.[16]

While perhaps the latter cannot constitutionally be prohibited, the former can. See *National Maritime Union* v. *NLRB*, 342 F. 2d 538, 546 (2d Cir.), cert. denied, 382 U. S. 835 (1965); cf. *Int'l Bhd. of Elec. Workers* v. *NLRB*, 341 U. S. 694, 705 (1951).[17] And the Board has justifiably concluded that here we have that type of picketing.

Accordingly, the union's petition for review is denied, and the Board's cross-petition to enforce is granted.

KAUFMAN, *Circuit Judge* (dissenting):

I find that I cannot concur in my brother Feinberg's interesting opinion. I would have less difficulty comprehending the thrust of the majority's opinion had it explained *N. L. R. B.* v. *Fruit Packers (Tree Fruits)*, 377 U. S. 58 (1964), as being limited to instances where the picketing publicizes a grievance in a dispute between a union and a primary employer;[1] or that consumer picket-

16 377 U. S. at 63.

17 Cf. Cox, Strikes, Picketing and the Constitution, 4 Vanderbilt L. Rev. 574, 591-602 (1951).

1 Unlike the union in *Tree Fruits*, Local 140 is not striking against any primary employer. Local 140 lost a representation election at U. S. Mattress in March 1962—3½ years before the picketing in this case—but the record is wholly devoid of any suggestion that it is now seeking to represent U. S. Mattress' employees who are affiliated with another union.

ing would be legal only if it was connected with such a dispute and did not seek to persuade potential customers to boycott the *entire* secondary enterprise. Such an interpretation of *Tree Fruits* might find some sanction in the Supreme Court's emphasis that the picketing in *Tree Fruits* was merely an extension of the primary dispute—where it was clearly legal—to a secondary situs, *id.* at 72, but it would not reflect the Court's "concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." *Id.* at 63. Compare Justice Black's concurring opinion, *id.* at 76. In light of the Supreme Court's exegesis of the legislative history of section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended, 29 U. S. C. §158(b)(4)(ii)(B), I consider it settled that the Board cannot enforce a ban against picketing that might conflict with the right of free speech unless there is the "clearest indication," *N. L. R. B.* v. *Drivers Local Union,* 362 U. S. 274, 284 (1960), that the picketing was part of the "isolated evil" that Congress wished to suppress. In the absence of a more explicit Congressional policy, I can only conclude, as did the Trial Examiner in this case, that there is "no reason to hold that a union may picket to persuade the public not to buy a struck product but not to persuade it not to buy non-union made products."[2] See *N. L. R. B.* v. *Upholsterers Frame & Bed. Wkrs.,* 331 F. 2d 561 (8th Cir. 1964) (consumer picketing to encourage the sale of locally manufactured union made products); cf. *Big Apple Supermarkets, Inc.* v. *Dutto,* 237 F. Supp. 774 (E. D. N. Y. 1965). Indeed, the majority insists that it does not decide today that "picketing to educate consumers to buy union-label

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2 Utilizing the terminology adopted in the proceedings below, goods produced by other unions as well as those produced by non-union workers will be referred to as "non-union."

merchandise" runs afoul of the Act. But, I fear that under the familiar rubric of applying the "substantial evidence" doctrine that is precisely what the majority has done; the effect of the decision is to hold such picketing illegal where, as here, it takes place at a retailer whose primary supplier is non-union.

On their face, the signs carried by Local 140 were clearly designed to do what the majority refuses to condemn as illegal—to induce the public to purchase union made products. Nevertheless, my brothers uphold the Board's "findings" that the object of the picketing was "to force or require a cessation of business dealings [by the retailers] with U. S. Mattress" and that the manner of picketing amounted to unlawful restraint and coercion because it was "designed to inflict injury on [the retailers'] business generally." I find the logic of this reasoning difficult to accept.

Whatever evidence there is to support the Board's characterization of the union's objective is at best meagre even when considered in light of the "substantial evidence" doctrine of *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474 (1951). There is absolutely nothing in the record to rebut the union's contention that the challenged picketing was merely one segment of a citywide campaign—in conjunction with allied locals of the United Furniture Workers of America, AFL-CIO—to increase the display and sale of *union produced merchandise.* Nor is there any response in the record to the Local's evidence that the target stores were selected more or less at random and included department stores and furniture retailers who sold the goods of many manufacturers. Moreover, it is not of little significance that the Trial Examiner, who alone had the opportunity to observe the demeanor of the witness

and to appraise the sincerity of the union's proclaimed objective, see *N. L. R. B.* v. *Local 3, Bloomingdale, etc.*, 216 F. 2d 285 (2d Cir. 1954), concluded that there was no evidence that the union officials did more than make clear that they wanted the stores to carry more union produced merchandise.

More basic, however, is my difficulty in acquiescing in the majority's uncritical acceptance of the Board's statement that:

> enforcement of its [Local 140's] union label requirements, as such, could not have been the true object of its concern. . . . the real object of its concern was with the retailers' handling of bedding from suppliers not under contract with it, specifically U. S. Mattress, and that the target of its picketing was to force a cessation of business dealings between the picketed retailers and such "non-union" manufacturers.

The significance and purport of the Board's language "union label requirements, as such" is obscure, but certainly it would be fatuous to argue that the union was merely seeking assurance that each item produced by a union shop bore a union label; such an objective could more easily be enforced at the manufacturer's plant.[3] The union's mission obviously was broader. The picket signs in bold type stated "Appeal to the public, please do not buy nonunion furniture, upholstery and bedding—Look for the union label." Although the majority professes not to hold that "picketing to educate consumers to buy union-label merchandise" is illegal, it would appear that no meaningful distinction can be drawn between such picket-

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3 Local 140's contract with the union shops that supplied the 3 retailers required the union label on all goods.

ing and picketing whose "real object . . . [is] with the retailer's handling of bedding from suppliers not under [union] contract."

It seems implausible and a bit hairsplitting not to recognize that since it is a fair assumption that the public's demand for bedding is not insatiable, requesting customers to purchase more union produced products is the practical equivalent to asking them to buy less from non-union manufacturers. In this case, U. S. Mattress was the only significant non-union manufacturer carried by Modern; it supplied 75 per cent of the store's total bedding.[4] Thus, when consumers were requested to purchase more union (and less non-union) products, they were in reality being asked to buy less from U. S. Mattress.[5] It would seem to follow, therefore, that the Board's characterization of the Local's objective (to force a cessation of dealings with U. S. Mattress) does not serve to specify one objective to the exclusion of all other objectives. In this case, the union could not possibly achieve its goal to have the public purchase more union produced goods without of necessity asking it to buy less from U. S. Mattress. The effect of the court's decision, therefore, is to put a premium on circumlocution.

The majority holds that the union's picketing is not protected by the rationale of *Tree Fruits* because "[t]he

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4 The record does not indicate what percentage of bedding U. S. Mattress supplied to the other stores. But Sidney Wucker, a partner in Wucker Furniture Company, testified that U. S. Mattress was their "prime source." And Nat Radelman, the president of Finkenberg's Furniture Company, upon advice of counsel refused to state how much he purchased from U. S. Mattress. It is clear, however, that U. S. Mattress was his major supplier.

5 When viewed in this context, the sparse and ambiguous references to U. S. Mattress by union officials are appropriately seen as another way of stating its case against non-union producers.

Board found that U. S. Mattress was an object of the union's activity . . . . [y]et the picket signs did not specify that company or its products in the message to consumers."[6] And, while the majority finds the issue "close," it decides that there is sufficient support for the Board's conclusion that the picketing was "aimed at inducing a generalized loss of patronage" by the three retailers. The Board's conclusion on this issue is reached by a tortuous route. It first attributed to the union an objective it denied (to force a cessation of dealings with U. S. Mattress), and then proceeded to fault the union for picketing with signs that did not reflect this alleged intent. The speciousness of the Board's decision is apparent when one considers its willingness to assume, for purposes of this case, that the picketing would have been within the covering shade of *Tree Fruits'* branches if U. S. Mattress had been specifically identified *nomine* on the signs. Whether or not the complex teachings of *Tree Fruits* had trickled down to the non-lawyers on the picket line (one may query who determines the terminology of signs in a highly organized campaign), it is odd to suggest that Local 140 went astray

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6 The majority also reasons that the picketing was outside the rationale of *Tree Fruits* because Local 140 clearly knew, at least as to Modern, that the lack of a union label did not indicate non-union merchandise. The signs, therefore, it is argued, could only be calculated to cause a generalized loss of patronage. But any store could easily obtain union labels from the union manufacturers they carried. See fn. 3 *supra*. Indeed, that is precisely what Modern did, placing the labels in its show window to counter the effect of the picketing. I attach little significance to the fact that the signs specified "furniture, upholstery and bedding" rather than only bedding. As noted above, the picketing was part of a concerted campaign by allied locals of the United Furniture Workers of America. I know no rule of law that prevents different locals of the same union from cooperating in this fashion. In any event, I fail to see how the 3 retailers would be benefited (or how the question before us would be meaningfully different) if members of all the locals showed up, one carrying a picket specifying "bedding," another "upholstery," and a third "furniture."

by stating on its signs an objective (buy more union goods) which my brothers refuse to hold violates the Act. The union is charged and faulted with attempting to accomplish by indirection that which it could have achieved directly.

In sum, I believe that in this case there is no reason to question that the picket signs correctly reflected the union's objective—to induce consumers to purchase more union-made products. A good deal can be said against the wisdom of subjecting retailers to what must realistically be seen as the pressure brought to bear by Local 140. But, if *Tree Fruits* has vitality, such consumer picketing is a legitimate exercise of persuasion by the union. I would set aside the Board's order.

Decree of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 31398

BEDDING, CURTAIN AND DRAPERY WORKERS UNION, LOCAL 140 OF THE UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Before: Kaufman, Anderson and Feinberg, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of Bedding, Curtain & Drapery Workers Union, Local 140, United Furniture Workers of America, AFL-CIO, to review and set aside a certain order of the National Labor Relations Board issued against petition, on May 2, 1967, and upon cross-petition of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on December 11, 1967, and has considered the briefs and the transcript filed in this cause. On January 19, 1968, the Court being fully advised in the premises, handed down its decision enforcing the order of the National Labor Relations Board.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Second

Decree of the Court of Appeals

Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Bedding, Curtain & Drapery Workers Union, Local 140, United Furniture Workers of America, AFL-CIO, its officers, agents, and representatives, abide by and perform the directions of the Board in said order contained.

WILFRED FEINBERG

Judge, United States Court of Appeals for the Second Circuit

ROBERT P. ANDERSON

Judge, United States Court of Appeals for the Second Circuit

Filed: February 13, 1968.

Decision and Order

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

[SAME TITLE]

On April 13, 1966, Trial Examiner John J. Funke issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged and recommending dismissal of the complaint in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel, the Respondent, and the Charging Party filed exceptions to the Decision and supporting briefs.

The National Labor Relations Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and finds merit in the exceptions of the General Counsel and the Charging Party. Accordingly, the Board adopts the Trial Examiner's findings, conclusions, and recommendations only to the extent consistent herewith.

U. S. Mattress Corp. is engaged at Irvington, New Jersey, in the manufacture and sale of mattresses, box springs, and related items of bedding. Its production and maintenance employees are represented by Teamsters Local 418. That local was certified by the Board in 1962 following an election in which Respondent appeared on the ballot. Respondent is a local affiliated with United Furniture Workers, AFL-CIO.

Decision and Order

At the time of the events here relevant, U. S. Mattress numbered among its customers Modern Stores, Inc., Wucker Furniture Company, and Finkenberg Furniture Co., Inc., companies operating retail furniture stores in New York City. All of Modern's suppliers of bedding, except for U. S. Mattress, were manufacturers whose production employees were represented by Respondent or by a sister local of Respondent. The same was true with respect to the suppliers of Wucker and Finkenberg, with but one minor exception.[1]

On October 1, 1965, Enio Carrion, a business agent of Respondent, appeared at Modern Stores in Brooklyn. After thoroughly inspecting all the bedding on display, but not other items of furniture and upholstery,[2] Carrion told Mrs. Leiboff, one of Modern's owners, that she carried "too much of U. S. Mattress" and that "U. S. Mattress doesn't belong to our union." Carrion mentioned the names of various bedding manufacturers whose employees were represented by Respondent, including two who were suppliers of Modern. Mrs. Leiboff pointed out that Modern did carry bedding of two of the bedding manufacturers he had just named, as she had shown him during his inspection tour of the store. Nevertheless, Carrion threatened to picket Modern "[b]ecause I want you to buy more from the Brooklyn firms." Before leaving, Carrion gave Mrs. Leiboff a card of Alex Sirota, Respondent's manager, and suggested that Leiboff call Sirota.

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[1] Wucker and Finkenberg purchased a chair bed from a nonunion manufacturer, Eclipse, but the purchases of this item by each store amounted to only a few hundred dollars on an annual basis.

[2] Respondent, as its name implies, basically represents only bedding, curtain, and drapery workers, not furniture employees.

Approximately a week later, pickets appeared in front of Modern's store with signs bearing the following legend:

APPEAL TO THE PUBLIC

PLEASE DO NOT BUY

NONUNION

FURNITURE

UPHOLSTERY & BEDDING

LOOK FOR THIS UNION LABEL

WHEN BUYING FURNITURE

UPHOLSTERY & BEDDING

[UFW LABEL]

UNITED FURNITURE WORKERS OF AMERICA

AFL-CIO

About a week after picketing began, Carrion again visited Modern, and, for the first time, told Mrs. Leiboff that all the merchandise must have union labels. Actually, as Carrion was able to observe from his earlier inspection tour of the store, even the bedding in the store supplied by manufacturers under contract with Respondent did not carry union labels. When Mrs. Leiboff explained this to Carrion, the latter appeared uninterested; he cryptically remarked, "Well until you have it . . .", and walked out. Subsequently, he refused to speak to one of the Respondent-organized manufacturers whom Mrs. Leiboff had contacted to confirm that his products were shipped to Modern without union labels. Later, in line with Carrion's earlier suggestion, Sol Portnoy, another of Modern's owners, called Respondent's manager Sirota. In response to Portnoy's query as to why Modern was being picketed, Sirota replied that it was because Modern "was carrying nonunion

brand merchandise." In the course of that conversation, Portnoy promised that Modern would thereafter buy only "Local 140 union-made" bedding. Not long thereafter, Respondent terminated its picketing of Modern's store.

Two weeks later, pickets bearing the same sign appeared in front of the stores of Wucker and Finkenberg. As found above, except for bedding produced by U. S. Mattress and an Eclipse chair bed, a very minor item in Wucker's and Finkenberg's inventories, all bedding on display and sale at these stores was manufactured by Respondent or a sister local. Respondent was then aware that manufacturers under contract with it shipped their products without union labels. Unlike the situation at Modern, the picketing at Wucker's and Finkenberg's stores began without prior warning or investigation. The picketing of these stores stopped 15 minutes after their owners promised to cease doing business with U. S. Mattress.[3]

In the total circumstances of this case, we are unable to accept Respondent's explanation that the object of its picketing was "to educate the public to look for the union label." Quite clearly, Respondent had no economic interest in conducting a consumer boycott of products made by its own members. Respondent was aware when it engaged in the picketing that bedding manufactured in its own unionized shops was shipped without union labels. It knew from its own investigation of Modern before it picketed that store that, except for some U. S. Mattress merchandise, all bedding carried by that store was produced in its own organized shops. It was in a position to know

[3] We find no merit in Respondent's contention that because the owners of these stores spoke to the business agent of the union representing their own employees rather than directly to an official of Respondent, the testimony relating to the aforesaid promises may not be considered. The business agent admitted while testifying that he spoke to Sirota on behalf of the store owners, and, it is obvious that he was known by Respondent to be acting as agent of the store owners.

that substantially the same was true of Wucker and Finkenberg. The singular unwillingness of its business agent, when so requested by Modern, to so much as speak to one of its organized manufacturers concerning the absence of union labels on the products markedly points up that enforcement of its union label requirements, as such, could not have been the true object of its concern.

On the contrary, Respondent's entire course of conduct was such as to leave little doubt—and we so find—that the real object of its concern was with the retailers' handling of bedding from suppliers not under contract with it, specifically U. S. Mattress, and that the target of its picketing was to force a cessation of business dealings between the picketed retailers and such "non-union" manufacturers. This, we are convinced, is abundantly demonstrated by the following: (a) Respondent's business agent's initial complaint to Modern that Modern "carried too much U. S. Mattress"; (b) his accompanying explanation that "U. S. Mattress does not belong to our Union"; (c) Respondent's explanation for the picketing of Modern during its course, that it was because Modern was "carrying non-union brand merchandise"; and (d) the fact that the picketing of each retailer ceased shortly after it had promised to discontinue its purchases of U. S. Mattress products.

However, even if we were to accept the Trial Examiner's narrower finding that the record here establishes no more than that Respondent "desired . . . more purchases of union bedding, less of Mattress," this would not alter our conclusion that the picketing was for an object interdicted by Section 8(b)(4)(B). It is well established that a purpose to force a diminution of dealings is as much an unlawful objective under that section as is a total cessation of dealings.[4]

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[4] See, e.g., *New York Telephone Co.*, 140 NLRB 729, 730.

Having found that an object of the picketing was to force or require a cessation of business dealings with U. S. Mattress, which stood in the position *vis-a-vis* Respondent of a primary disputant,[5] we turn to the question of whether the method employed—promotion through the picketing of a consumer boycott of products sold by the picketed retailers—was such as to constitute in the circumstances of this case unlawful restraint and coercion of secondary persons within the meaning of Section 8(b)(4)(ii). The Trial Examiner, on the basis of his interpretation of the *Tree Fruits* case,[6] found that it was not. To that finding the General Counsel has excepted, contending that *Tree Fruits* is inapposite to the facts of this case. We agree with the General Counsel.

The *Tree Fruits* case arose from a collective-bargaining dispute between fruit packing companies in Yakima, Washington, and a union representing their employees. The union struck in support of its bargaining position, and after the strikers were replaced with nonunion employees, the union decided to institute a consumer boycott of the apples packed by the replacements. To appeal for such consumer boycott, the union picketed retail food stores selling such apples, including Safeway, a chain of retail stores that sold them as one of its numerous food products. Prior to the commencement of picketing, the manager of each of these Safeway stores received a letter from the union, informing him that the picketing would be directed

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[5] The fact that there was then no active labor dispute between Respondent and U. S. Mattress, or between it and any other "nonunion" manufacturers whose products it might also have wanted boycotted is immaterial. *Sound Shingle*, 101 NLRB 1159, enfd. *N.L.R.B.* v. *Washington Oregon Shingle Weavers Dist. Council*, 211 F. 2d 149, 152-153 (C.A. 9); *Local 1976, United Brotherhood of Carpenters*, 113 NLRB 1210, 1211-1212, affirmed 357 U.S. 93.

[6] *N.L.R.B.* v. *Teamsters, Local 760, Fruit & Vegetable Packers*, 377 U.S. 58 (1964).

only to his customers and would ask them not to buy apples packed by the firms with whom the union had a dispute. The letter further stated that the pickets were instructed to patrol only in front of consumer entrances and not to interfere with the work of the employees or with deliveries. The handbills and picket signs informed the consumers:

DON'T BUY
WASHINGTON STATE
APPLES

THE 1960 CROP OF WASHINGTON STATE APPLES
IS BEING PACKED BY NON-UNION FIRMS

Included in this non-union operation are twenty-six firms in the Yakima Valley with which there is a labor dispute. These firms are charged with being

UNFAIR

by their employees who, with their union, are on strike and have been *replaced by non-union strike-breaking workers* employed under substandard wage scales and working conditions.

In justice to these striking union workers who are attempting to protect their living standards and their right to engage in good-faith collective-bargaining, we request that you

DON'T BUY
WASHINGTON STATE
APPLES

TEAMSTERS UNION LOCAL 760
Yakima, Washington

This is not a strike against any store or market.

(P.S.—PACIFIC FRUIT & PRODUCE Co. is the only firm packing Washington State Apples under a union contract.)

Thus, the picketing in the *Tree Fruits* case was clearly "confined to [the Union's] dispute with the primary employer, since the public [was] not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's goods."[7] And the Court's opinion concluded that the legislative history ". . . does not reflect with the requisite clarity a congressional plan to proscribe *all* peaceful consumer picketing at secondary sites, and, particularly, any concern with peaceful picketing *when it is limited, as here,* to persuading Safeway customers not to buy Washington State apples when they traded in the Safeway store." [Emphasis supplied.][8]

The Court's analysis of the legislative history in terms of the particular picketing involved in *Tree Fruits* was reflected in its holding that:

> ". . . *the picketing in this case, confined as it was* to persuading customers to cease buying the product of the primary employer . . . did not 'threaten, coerce, or restrain' [the secondary employer]." [Emphasis supplied.]

This holding was further clarified by the Court's contrasting picketing that was unlawful, although directed at consumers, with this lawful consumer picketing. Thus, the Court stated that "[p]eaceful consumer picketing to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer is poles apart from . . ." the picketing engaged in by the union in *Tree Fruits*,[9] and the Court concluded that Congress did intend to bar the former type of picketing.[10]

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[7] *Id.* at 63.
[8] *Id.* at 63.
[9] *Id.* at 70.
[10] *Id.* at 63, 71.

We find that the picketing in the case before us falls within the former area that Congress did intend to forbid. As we have found above, Respondent's true concern was not with the promotion of the union label as such,[11] but rather with the display and sale by the picketed stores of bedding manufactured by U. S. Mattress, or, at most, of bedding products manufactured by "nonunion" manufacturers, as Respondent construed that term. For purposes of decision here, we assume that Respondent could have lawfully picketed at the retail establishment to appeal to consumers not to buy the products of U. S. Mattress, or of any other specifically identified producer with whom Respondent may then have had a primary labor dispute. It is quite clear, however, that Respondent's picketing appeal was knowingly and deliberately intended to achieve a wider reach. Unlike the union in *Tree Fruits*, Respondent did not by the legend on its picket sign, or otherwise, define the limits of its dispute by clearly identifying the primary employer or its product so as to make readily apparent to the consuming public precisely against whom its boycott appeal was directed. Its broadly gauged appeal to "look for [its] union label" was not sufficiently restrictive, for as Respondent was aware, union labels were not attached to products shipped by its own unionized manufacturers with whom it had no dispute; it also knew in the case of Modern, and in the case of the two others, if it did not already know, could have readily determined had it troubled to investigate, that such "union" but nonlabeled merchandise was carried in the picketed stores. Moreover, though—as Respondent in effect concedes in its brief—its boycotting campaign was concerned only with

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[11] Because of our findings in this regard, we find it unnecessary to express any view as to whether Respondent's picketing, as conducted in this case, would have been lawful had that been its object.

the sale of "nonunion" bedding, i.e., mattresses and upholstered bedding products, and not with other types of furniture, Respondent's picketing appeal was not so limited; the picket sign urged the public not to buy "nonunion furniture" generally. It is thus evident that the picketing was aimed at inducing a generalized loss of patronage by the stores.

The conclusion is therefore inescapable that Respondent's picketing was not ". . . employed only to persuade customers not to buy the struck product . . ." but was ". . . designed to inflict injury on [the secondary employers'] business generally". Accordingly, we find that Respondent's picketing, unlike that of the union in *Tree Fruits,* did "threaten, coerce, and restrain" the picketed retail stores within the meaning of Section 8(b)(4)(ii). Having earlier found that an object of the picketing was to force and require a cessation of business between the picketed stores and U. S. Mattress, we conclude that, by its picketing of the three stores, as well as by its earlier threat to picket Modern, Respondent violated Section 8(b)(4)(ii)(B) of the Act.[12]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Bedding, Curtain & Drapery Workers Union, Local 140, United Furniture Workers of America, AFL-CIO, its officers, agents, and representatives, shall:

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[12] Because of the basis on which we decide this case, we deem it unnecessary to pass on the question whether the picketing here may also have been removed from the *Tree Fruits* immunity because Respondent might not have been able to picket U. S. Mattress directly without violating Section 8(b)(7)(A). Cf. *Goldfinger* v. *Feintuch,* 11 NE 913, cited in *Tree Fruits, supra,* at p. 63.

1. Cease and desist from:

(a) Threatening, coercing, and restraining Modern Stores, Inc.; Finkenberg Furniture Co., Inc.; Sidney Wucker and Dudley Wucker d/b/a Wucker Furniture Company; or any other person, where an object thereof is to force or require Modern Stores, Inc.; Finkenberg Furniture Co., Inc.; Sidney Wucker and Dudley Wucker d/b/a Wucker Furniture Company; or any other employer or person, to cease doing business with U. S. Mattress Corp.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post copies of the attached notice marked "Appendix"[13] at its offices and meeting halls. Copies of said notice, to be furnished by the Regional Director for Region 2, shall, after being duly signed by the Respondent, be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken to insure that the notices are not altered, defaced, or covered by any other material.

(b) Furnish to the said Regional Director copies of the aforementioned notice for posting by Modern Stores, Inc.; Sidney Wucker and Dudley Wucker d/b/a Wucker Furniture Company; and Finkenberg Furniture Co., Inc., the companies willing, at the picketed stores.

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[13] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order".

(c) Notify the Regional Director, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C., May 2, 1967.

FRANK W. MCCULLOCH,
Chairman

JOHN H. FANNING,
Member

GERALD A. BROWN,
Member

HOWARD JENKINS, JR.,
Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO ALL MEMBERS

OF LOCAL 140, BEDDING, CURTAIN & DRAPERY WORKERS UNION, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT, by picketing or otherwise, threaten, coerce, or restrain Modern Stores, Inc.; Sidney Wucker and Dudley Wucker d/b/a Wucker Furniture Company; or Finkenberg Furniture Co., Inc., or any other person, where an object thereof is to force or require Modern Stores, Inc.; Sidney Wucker and Dudley Wucker d/b/a Wucker Furniture Company; or Finkenberg Furniture Co., Inc., or any other employer or person, to cease doing business with U. S. Mattress Corp.

LOCAL 140, BEDDING, CURTAIN & DRAPERY WORKERS UNION, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO

.....

(Labor Organization)

Dated .....by .....

(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Fifth Floor, Squibb Building, 745 Fifth Ave., New York, New York 10022 (Tel. No. 751-5500).

Trial Examiner's Decision

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 2-CC-1000

BEDDING, CURTAIN & DRAPERY WORKERS UNION, LOCAL 140 of the UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO

and

Case No. 2-CC-1000

U. S. MATTRESS CORP.

Martin M. Arlook, Esq., of New York, N. Y., for the General Counsel.

Victor Rabinowitz, Esq., of New York, N. Y., for the Respondent.

Leonard Kimmel, Esq., of Mineola, N. Y., for the Charging Party.

Before: *John F. Funke*, Trial Examiner.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

Upon a charge filed November 9, 1965, by U. S. Mattress Corp., herein Mattress, against Bedding, Curtain & Drapery Workers Union, Local 140, of the United Furniture Workers of America, AFL-CIO, herein Local 140 or the Respondent, the General Counsel issued a complaint alleging Respondent violated Section 8(b)(4)(ii)(B) of the Act. The answer of the Respondent denied the commission of unfair labor practices and denied that the picketing set forth in the complaint constituted a violation of said section.

This proceeding, with all parties represented was heard before me at New York, New York, on February 2 and 3, 1966. At the conclusion of the hearing the parties were given leave to file briefs and briefs were received from the General Counsel and Respondent.

Upon the entire record in this case and from my observation of the witnesses, I make the following:

Findings and Conclusions

I. The companies involved

1. Mattress is a New Jersey corporation having its principal place of business at Irvington, New Jersey, where it manufactures mattresses, box springs and related products. It sells products valued in excess of $100,000 annually to customers located outside the State of New Jersey. It is engaged in commerce within the meaning of the Act.

2. Modern Stores, Inc., herein Modern, is a New York corporation operating a retail furniture store in Brooklyn. Its annual gross revenues exceed $300,000 and its purchases of furniture from points outside the State of New York exceed $50,000 annually.

3. Finkenberg's Furniture Company, Inc., herein Finkenberg's, is a New York corporation operating a retail furniture store in New York City. Its annual gross revenues exceed $400,000 and its purchases of merchandise from points outside the State of New York exceed $50,000 annually.

4. Wucker Furniture Company, herein Wucker, is a partnership operating a retail furniture store in New York City. Its annual gross revenues exceed $500,000. It purchases merchandise valued in excess of $50,000 annually from points outside the State of New York.

I find that Mattress and Wucker are engaged in commerce within the meaning of the Act and that the Board has jurisdiction over the proceedings herein. *Chauffeurs, Teamsters & Helpers Local No. 364, et al. (The Light Co.)*, 121 NLRB 221.

II. Labor organization involved

Respondent is a labor organization within the meaning of the Act.

III. The alleged unfair labor practices

A. *The facts*

The sole question presented is whether the Respondent's picketing was unlawful under the circumstances of the case. The picketing technique, which might be described as hit-or-miss picketing, was devised by Respondent as a means of increasing the sale of union-made bedding in the metropolitan area. Local 140 had contracts with many bedding manufacturers in the area but not with Mattress, the Charging Party. In a Board election held in 1962, in which Local 140 appeared on the ballot, Local 418, Teamsters, was designated as the collective bargaining agent of the Mattress employees and Local 418 and Mattress have enjoyed a contractual relationship ever since. During the year 1965 Mattress sold its products to Modern, Finkenberg's and Wucker as well as to other retail stores.

Modern bought its bedding from Dandy, F & R, Serta and Mattress. The employees of Dandy and F & R were represented by Local 140; those of Serta by a sister local of Respondent. Wucker and Finkenberg's sold union bedding produced by companies represented by Respondent or by locals affiliated with the Furniture Workers except for purchases from Mattress and minor purchases of chairbeds from a nonunion company known as Eclipse.

The Union's picketing procedures were, according to Alex Sirota, its business manager, simple. When business at the wholesale level was slow and there existed a danger of a layoff among the Union's members at the manufacturing outlets the Union selected, at random, retail stores in the metropolitan area for picketing. The picketing would commence without notice or warning to the stores and without investigation as to whether the stores were selling union or nonunion bedding. The immediate response to the picketing would be inquiry, as might be expected, from the store owner as to the reason. The store owner would be told he was selling nonunion bedding or bedding without a union label. If he sold union bedding the pickets were withdrawn, if he was selling nonunion bedding and agreed to discontinue or to diminish his purchases of nonunion products the pickets were then withdrawn. The sole purpose of the picketing was to increase the sale of union made and union labeled bedding as against nonunion bedding. There was, at least on the facts of this case, no extension of a primary dispute with any manufacturer, union or nonunion, to the retailer's store. Now to the incidents which provoked the charge herein.

Mrs. Fay Leiboff, president of Modern, testified that on or about October 1, 1965,[1] one of her salesmen brought Enio Carrion, a representative of Local 140, into the store. Carrion asked to see her bedding and after examining told her that she was carrying too much Mattress merchandise and that Mattress did not "belong" to Local 140. When Leiboff mentioned the union-made furniture she bought, Carrion told her she did not buy enough from Brooklyn (Local 140) firms. He then told her he was going to throw up a picket line because he wanted her to buy more in Brooklyn. Carrion gave her Sirota's card and left. He returned after the line had been established and told her

[1] Unless otherwise noted all dates refer to 1965.

she did not have union labels on the furniture and Leiboff told him the union firms did not ship bedding with union labels. She called F & R for labels and was told they did not have any. She then called Dandy and told them of her trouble. The Dandy representative asked to speak to Carrion, who was with the pickets, but Carrion refused to talk.[2]

The picketing continued for about 2½ weeks, from 9:30 a.m. to 4 p.m. The picket placards bore the following legend:

APPEAL TO THE PUBLIC

PLEASE DO NOT BUY

NON-UNION

FURNITURE

UPHOLSTERY & BEDDING

LOOK FOR THIS UNION LABEL

WHEN BUYING FURNITURE

UPHOLSTERY & BEDDING

[Label]

UNITED FURNITURE WORKERS OF AMERICA

AFL-CIO

Modern placed no orders with Mattress after the picketing commenced but the Mattress bedding remained on display.

Sol Portnoy, secretary-treasurer of Modern, testified that after the picket line had been established he called Local 140 and spoke to a Mr. Wagner who told him Modern was being picketed because it was displaying nonunion merchandise. Later Portnoy spoke with Sirota who told him they were carrying nonunion brand merchandise. Port-

[2] Leiboff received some union labels from Dandy and put them in the store window.

noy told him that of their four suppliers, two had contracts with Local 140, one with a sister local and one (Mattress) with the Teamsters. He asked Sirota what he could do to rid himself of "this nonsense" and was told to have union label merchandise on the floor. Portnoy asked Sirota how long the picketing would continue and was told it was up to him (Sirota) to decide. He then told Sirota that if he had to buy from union shops this is what he would do. As a result of this talk Carrion made his second visit to the store to inspect the labels.

Sirota testified that when Portnoy asked him what was required to stop the picketing he told him, "if you will place union merchandise with union labels, then we'll remove the pickets."[3] Carrion testified that when he inspected the furniture at Modern none of it carried a union label.[4] (Local 140 contended that all union-made bedding was required to carry the union label.) While the testimony is clear as to the reason for establishing a picket line at the store it is not equally clear why it was discontinued. Carrion "assumed" that it was as a result of a meeting between an association of retail furniture store owners and Local 140 but Modern was not a member of this association. The record indicates that there was no picketing of any retail stores from the date of this meeting to the time of hearing. The cessation does not appear to have resulted from any agreement between Modern and the Union.

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[3] The general objective of the picketing, according to Sirota, was to educate the public to look for the union label. He stated, "if there are union merchandise on the floor that carry a union label or union merchandise with union labels on the floor, we stop the picketing and go to the next store". No requirement as to the ratio of union-labelled merchandise to non-labelled in any particular store was ever fixed.

[4] No explanation why the bedding purchased from union stores did not carry union labels was ever given. Three employees of union manufacturers (none involved in this proceeding) testified that it was required to attach the union label before the bedding was shipped.

Morris Segal, secretary of Finkenberg's, testified that on Tuesday, November 9, two pickets bearing signs with the legend on General Counsel's Exhibit No. 3, appeared at his store. The picketing continued from 9 a.m. to 4:30 p.m. for 3 or 4 days. Finkenberg's purchased from Mattress and from union shops. Nat Radelman, president of Finkenberg's, testified that the picketing ceased shortly after he had a conversation with Frank Schaffer, business manager of Local 853, Retail Furniture and Floor Covering Employees Union, which represented his sales employees. Radelman testified that in this conversation he told Schaffer he would cease buying from Mattress if the pickets were removed.

Sidney Wucker, a partner in Wucker, testified that on November 8 he found a picket in front of his store with the same sign. He asked the picket what he should do and was told to call Sirota. Sirota was unavailable but Wucker's shop steward suggested he call Frank Schaffer. He asked Schaffer to talk to Sirota. Wucker also told Schaffer he would discontinue purchases from Mattress. He then put his shop steward on the telephone with Schaffer, the shop steward brought the pickets in and put one of them on the telephone. The pickets, when their conversation was finished, left and the picketing did not resume.

Frank Schaffer, business manager of Local 853, Retail Furniture and Floor Covering Employees Union, was called by the General Counsel and proved to be a reluctant if not adverse witness. Local 853 represented the employees at Finkenberg's and at Wucker and he administered the contracts at these stores. He admitted that on or about November 8 Sidney Wucker called and told him Local 140 was picketing his store and asked him for help. He called Sirota and quoted Sirota as saying, "I'd like Mr. Wucker to put in some merchandise with union labels, not keep all merchandise without union labels." Schaffer relayed this message to Wucker and also told him to have one of his

(Schaffer's) people get a picket to call Sirota. (This suggestion was made by Sirota.) Schaffer then testified that to the best of his recollection he had no discussion with Wucker concerning the removal of Mattress bedding or the merchandise of any specific company. He could not recall that Sidney Wucker had told him that he would get rid of Mattress merchandise.

Later in November Radelman, of Finkenberg's, called him and told him Finkenberg's was picketed by Local 140. Radelman asked him to call Sirota and find out what he wanted. Schaffer called and received the same answer, "Look, if he does not handle all these merchandise without union labels, I will not picket him." Again Schaffer relayed the message to Radelman. He did not know what happened after that.

B. *Conclusions*

Counsel appears to be in agreement that the issues of law presented is whether the picketing herein was protected by the decision of the United States Supreme Court in the *Tree Fruits* case. (*N.L.R.B.* v. *Fruit and Vegetable Packers and Warehousemen, Local 760, et al.* (*Tree Fruits Labor Relations Committee, Inc.*), 377 U.S. 58). They are not, of course, in agreement as to the conclusion to be reached and some history seems in order.

The Board's position prior to the Supreme Court decision was contrary to that taken by the Court. The Board had in fact faced a picketing situation similar to that in the instant case in *Upholsterers Frame & Bedding Workers Twin City Local No. 61, et al.* (*Minneapolis House Furniture Company*), 132 NLRB 40, before *Tree Fruits* reached the Board.

In the *Upholsterers* case pickets were placed by the Respondent Union in front of two retail stores with signs re-

questing the customers "to patronize home industry" and to buy "Union made products." Delivery entrances were not picketed and no work stoppages occurred within the stores. The messages, both on the signs and in the leaflets distributed, were addressed solely to the customers of the stores. There was no contact between the Union and the owners of the stores. The Board found no violation of Section 8(b)(4)(i)(B) under these circumstances but it did find that the picketing had as its object the forcing or requiring of the stores to buy locally and to buy union-made products and that the Union by such picketing coerced and restrained the owners in violation of Section 8(b)(4)(ii)(B), citing Gilmore Construction[5] and Perfection Mattress & Spring Company.[6]

Before the case reached the Court of Appeals for the Eighth Circuit the Supreme Court issued *Tree Fruits* and the Court, relying on that decision, reversed the Board and denied enforcement,[7] which brings us to *Tree Fruits.*

The Board had held in *Tree Fruits,* relying on its construction of the statute in its decision in the *Upholsterers* case, *supra,* that "by literal wording of the proviso [to Section 8(b)(4)] as well as through the interpretive gloss placed thereon by its drafters, consumer picketing in front of a secondary establishment is prohibited." 132 NLRB 1172, 1177. The Court of Appeals for the District of Columbia set aside the Board's order and remanded to receive evidence "upon the issue whether Safeway (whose stores were picketed) was in fact threatened, coerced or restrained." 308 F. 2d 311, 318. It was to this decision that the Supreme Court granted certiorari.

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[5] *International Hod Carriers, etc. (Gilmore Construction Company),* 127 NLRB 541.

[6] *United Wholesale and Warehouse Employees, Local 261 (Perfection Mattress & Spring Company),* 129 NLRB 1014.

[7] *N.L.R.B.* v. *Upholsterers, etc.,* 331 F. 2d 561.

Mr. Justice Brennan, writing for the majority,[8] summarized the facts thusly:

> Respondent Local 760 called a strike against fruit packers and warehousemen doing business in Yakima, Washington. The struck firms sold Washington State apples to the Safeway chain of retail stores in and about Seattle, Washington. Local 760, aided by respondent Joint Council, instituted a consumer boycott against the apples in support of the strike. They placed pickets who walked back and forth before the customers' entrances of 46 Safeway stores in Seattle. The pickets—two at each of 45 stores and three at the 46th store—wore placards and distributed handbills which appealed to Safeway customers, and to the public generally, to refrain from buying Washington State apples, which were only one of numerous food products sold in the store. Before the pickets appeared at any store, a letter was delivered to the store manager informing him that the picketing was only an appeal to his customers not to buy Washington State apples, and that the pickets were being expressly instructed "to patrol peacefully in front of the consumer entrances of the store, to stay away from the delivery entrances and not to interfere with the work of your employees, or with deliveries to or pickups from your store." A copy of written instructions to the pickets—which included the explicit statement that "you are also forbidden to request that the customers not patronize the store"—was enclosed with the letter. Since it was desired to assure Safeway employees that they were not to cease work, and to avoid any interference with pickups or deliveries,

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[8] Justices Harlan and Stewart dissented and Justice Black wrote a separate concurrence.

the pickets appeared after the stores opened for business and departed before the stores closed. At all times during the picketing, the store employees continued to work, and no deliveries or pickups were obstructed.

Washington State apples are handled in normal course by both Safeway employees and the employees of other employers involved. Ingress and egress by customers and others was not interfered with in any manner. (Footnotes omitted.)

Citing the statutory language of Section 8(b)(4)(ii)(B) he found the question of law was "whether the respondent unions violated this section when they limited their secondary picketing of retail stores to an appeal to customers not to buy the products of certain firms against which one of the respondents was on strike."

The Board, the majority found, read the statute as revealing a Congressional purpose to outlaw all picketing directed at customers at a secondary site and that such picketing was *per se* coercive. The Court did not agree but rather held, resorting to the history of federal regulation of picketing, that the Congress had "consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable." It then expressed concern that a broad ban against peaceful picketing might collide with the First Amendment.[9]

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[9] Justice Black agreed with Justices Harlan and Stewart that it was the legislative intent to forbid picketing by employees of one employer at the premises of a neutral employer where the purpose was to persuade customers of the neutral employer not to buy the goods of the struck employer. He found, however, that such a ban abridged freedom of speech in violation of the Fifth Amendment.

In searching for the shadowy and elusive line of demarcation the Court started with the premise that it would not ascribe to the Congress a purpose to outlaw peaceful picketing unless "there is the clearest indication in the legislative history" that Congress intended to do so as regards the particular ends of the picketing. Returning to the specific issue before the Court it found no congressional concern with peaceful picketing to persuade Safeway customers not to buy Washington State applies in Safeway stores. Continuing, the Court said:

> We have examined the legislative history of the amendments to § 8(b)(4), and conclude that it does not reflect with the requisite clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites, and particularly, any concern with peaceful picketing when it is limited, as here, to persuading Safeway customers not to buy Washington State apples when they traded in the Safeway stores. All that the legislative history shows in the way of an "isolated evil" believed to require proscription of peaceful consumer picketing at secondary sites, was its use to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon the primary employer. This narrow focus reflects the difference between such conduct, and peaceful picketing at the secondary site directed only at the struck product. In the latter case, the union's appeal to the public is confined to its dispute with the primary employer, since the public is not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's goods. On the other hand, a union appeal to the public at the secondary site not to trade at all with the secondary employer goes beyond the goods of the primary em-

ployer, and seeks the public's assistance in forcing the secondary employer to cooperate with the union in its primary dispute. This is not to say that this distinction was expressly alluded to in the debates. It is to say, however, that the consumer picketing carried on in this case is not attached by the abuses at which the statute was directed. (Footnotes omitted.)

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In sum, the legislative history does not support the Board's finding that Congress meant to prohibit all consumer picketing at a secondary site, having determined that such picketing necessarily threatened, coerced or restrained the secondary employer. Rather, the history shows that Congress was following its usual practice of legislating against peaceful picketing only to curb "isolated evils."

This distinction is opposed as "unrealistic" because, it is urged, all picketing automatically provokes the public to stay away from the picketed establishment. The public will, it is said, neither read the signs and handbills, nor note the explicit injunction that "this is not a strike against any store or market." Be that as it may, our holding today simply takes note of the fact that a broad condemnation of peaceful picketing, such as that urged upon us by petitioners, has never been adopted by Congress, and an intention to do so is not revealed with that "clearest indication in the legislative history," which we require.

It would appear that no decision could be clearer. The tactics employed by the parties to labor disputes are devious and diverse, however, and do not always adhere to a charted course. Here the picketing was peaceful and di-

rected exclusively to the customers. No employees were induced, no deliveries were halted. Nor can I find any distinction in the fact that in *Tree Fruits* a struck product was involved. I see no reason to hold that a union may picket to persuade the public not to buy a struck product but may not persuade it not to buy non-union made product. The Eighth Circuit found no such distinction in *Upholsterers, supra,* and I find none.

Here there were, however, direct and indirect contacts between the owners of the stores and Local 140. Thus Carrion visited Modern before the picketing started, examined its furniture, told Mrs. Leiboff that she did not buy enough from Brooklyn (presumably union) firms, and told her she carried too much U.S. Mattress. He also told her he was going to put up a picket line. After the line was established Carrion came back and told her her furniture, including union-made furniture, did not have union labels.[10] Sometime during the picketing period Portnoy called Local 140 and was told by a Mr. Wagner that they were picketed because they displayed nonunion merchandise or merchandise which did not bear the union label. Later he spoke to Sirota who also told him it was because he carried nonunion or nonlabelled merchandise. Portnoy testified that when he asked Sirota how to get rid of the pickets he was told to have union-labelled merchandise on the floor. Portnoy told him he would do what he had to do and thereafter ordered no more merchandise from Mattress.

The dealings between Wucker and Finkenberg's and Local 140 were indirect. In each store Schaffer, representative of the salesmen, was called shortly after the pickets appeared. Schaffer called Wucker back after he talked to Sirota and Wucker told him he would take off the nonunion

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[10] Local 140, for reasons readily discernible, attached as much importance to the union label as it did to the fact that the merchandise was produced by union (United Furniture Workers') labor.

merchandise if he (Sirota) would take off the pickets. (There is nothing in the record to indicate that Sirota conditioned the removal of the pickets upon such action.) One of the pickets then went to the telephone and following a conversation, the pickets left.

The following day Finkenberg's was picketed by Local 140. According to Radelman the picketing lasted for three or four days, then ceased for a few days and was then resumed for a few days. During the initial picketing Radelman called Schaffer and told him he would stop buying Mattress merchandise but again the record does not indicate that any such demand was made, either by Sirota or by Schaffer acting as an agent for Sirota.

Schaffer testified that he talked to Sirota following a request from Sidney Wucker and was told by Sirota that he would like Wucker to carry merchandise with union labels. Schaffer received the same response from Sirota with respect to Finkenberg's.

Sirota's testimony has been reviewed earlier and adds little to the crucial issue.

The narrow and not too difficult question presented is whether Respondent by conduct apart from the picketing coerced Modern, Wucker and Finkenberg's with the object of forcing them to do business with Mattress and whether such coercion was thereby extended to the picketing itself. I find no evidence that either Carrion or Sirota demanded that any of the three stores discontinue Mattress merchandise.[11] Carrion, if Leiboff is to be credited, told her she

[11] While Portnoy testified that he was told by Wagner and Sirota that Modern was picketed because it displayed too much nonunion and nonunion labelled merchandise the implication I read into this is a request to display more union-labelled products, not a request to discontinue all display of non-union products. This is in keeping with Sirota's testimony that at a meeting with Maurice Friedman, attorney for the retail stores' association, and Schaffer he told them the picketing would cease if Modern displayed union labelled bedding.

carried too much Mattress bedding and both Carrion and Sirota made it clear that they wanted more union-labelled merchandise on the floor. Quite inevitably Respondent's appeals to customers, if successful, would lead to that result. The picketing was not purely ideological, it sought bread and butter gains for its members who, to quote Sirota, were "starving." The purpose of the picketing of Safeway was likewise to aid the striking union members by reducing the market for Washington apples. What distinguishes the two cases is that here Respondent told at least two owners what it desired—more purchases of union bedding, less of Mattress. Requesting a store owner to purchase more union merchandise and less nonunion is not an act of coercion nor is it a request that he cease[12] doing business with nonunion firms. If coercion for an unlawful objective is to be found it rests on Local 140's threat to picket if its request was not complied with and on making the removal of the pickets conditional upon a change in purchasing and display policies by the stores. But if the picketing was lawful under Tree Fruits[13] how can the threat

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[12] Webster's "New International Dictionary" defines cease as: "to come to an end; to stop; to leave off or give over; to desist." In view of the decision herein I find it unnecessary to consider whether picketing which seeks a diminution in business between a primary and secondary employer is covered by a statute which employs "cease". The Board has answered this question in the affirmative in Local 825, *International Union of Operating Engineers (Nichols Electric Company)*, 138 NLRB 540, 543, 544. The Board was, however, reversed by the Court of Appeals for the Third Circuit, 326 F. 2d 218, which found no evidence that an objective was to compel the primary contractor to cease doing business with a subcontractor.

[13] The language used by the Court is neither cautionary nor restraining. If the object of the picketing is to persuade customers not to purchase a particular product it is lawful. If the object is to persuade customers to withhold all patronage from the store it is unlawful. Derivative benefits which might accrue to a union if its public appeal is effective are not to be substituted as a test of objective.

to engage in such picketing be made unlawful? The Board was faced with this question in *General Drivers, Chauffeurs, and Helpers, Local 886 (The Stephens Company)*, 133 NLRB 1391. There the respondent union directed a letter to secondary employers threatening to picket their premises "in strict conformity with the standards for ambulatory picketing" and citing the *Moore Drydock* line of decisions. A panel majority held that this letter did no more than state that the union would exercise its lawful rights and did not violate Section 8(b)(4)(ii)(B). I agree that there is an element of coercion in any threat to picket just as there is in any threat to strike but if either the picketing or the strike is a protected form of concerted activity the threat to engage in either cannot be unlawful.

I find Respondent did not threaten, coerce or restrain Modern, Wucker or Finkenberg with the object of forcing them to cease doing business with Mattress and did not violate Section 8(b)(4)(ii)(B) of the Act.

Dated at Washington, D. C.

JOHN F. FUNKE,
John F. Funke,
Trial Examiner.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1355

BEDDING, CURTAIN AND DRAPERY WORKERS UNION, LOCAL 140 OF THE UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–23a) is reported at 390 F. 2d 495. The decision and order of the National Labor Relations Board (Pet. App. 26a–38a) are reported at 164 NLRB No. 27.

JURISDICTION

The decree of the court of appeals (Pet. App. 24a–25a) was entered on February 13, 1968. The petition for a writ of certiorari was filed on April 22, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

307-267—68

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the union's picketing at certain retail stores threatened, coerced, and restrained the stores with an object of forcing them to cease doing business with one of their suppliers.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the petition (pp. 2–3).

STATEMENT

On October 1, 1965, Enio Carrion, a business agent of petitioner Local 140, visited Modern Stores, Inc. ("Modern"), in Brooklyn, New York (Pet. App. 27a; J.A. 47a).[1] After inspecting all of the mattresses on display, Carrion told Mrs. Leiboff, one of Modern's owners, that the store carried "too much of U.S. Mattress" and that "U.S. doesn't belong to our union" (Pet. App. 27a; J.A. 47a–48a).[2] Carrion made reference to various bedding manufacturers whose employees were represented by Local 140 (Pet. App. 27a; J.A. 49a). When Mrs. Leiboff pointed out that Modern carried bedding of two of the manufacturers he had just named, Carrion replied, "you don't buy enough from Brooklyn firms" (*ibid.*). Carrion then threat-

[1] "J.A." refers to the joint appendix in the court below.

[2] U.S. Mattress Corp. is located at Irvington, New Jersey (Pet. App. 26a; J.A. 43a). Its employees have been represented since 1962 by Teamsters Local 418, which was certified by the Board following an election in which Local 140 appeared on the ballot (Pet. App. 26a; J.A. 144a–145a).

ened to picket Modern "[b]ecause I want you to buy more from the Brooklyn firms" (*ibid.*).

About a week later, pickets appeared in front of Modern's store with signs bearing the following legend (Pet. App. 28a): "Appeal to the Public/Please do not buy/Nonunion/Furniture/Upholstery & Bedding/ Look for this Union Label/ When Buying Furniture/ Upholstery & Bedding/[UFW Label]/ United Furniture Workers of America/AFL-CIO."

A few days after the picketing began, Carrion returned to Modern's store and complained that Modern's merchandise "did not have union labels" (Pet. App. 28a; J.A. 50a). Mrs. Leiboff pointed out that even the bedding supplied by manufacturers under contract with Local 140 did not carry union labels (*ibid.*). Mrs. Leiboff then called two of Modern's suppliers whose employees were represented by Local 140, and asked them to send her union labels (*ibid.*). One firm indicated that it had none; the other asked her to put Carrion on the phone, but Carrion refused to talk to it (*ibid.*).

After two weeks of picketing, Sol Portnoy, another of Modern's owners, spoke to Alex Sirota, president of Local 140, by telephone (Pet. App. 28a; J.A. 55a–56a, 64a). In response to Portnoy's query as to why Modern was being picketed, Sirota replied that it was because Modern "was carrying nonunion brand merchandise" (Pet. App. 28a–29a; J.A. 56a, 62a). Portnoy then promised that henceforth Modern would buy only "Local 140 union-made" bedding (Pet. App. 29a; J.A. 63a). Not long thereafter, Local 140 terminated

its picketing of Modern's store (Pet. App. 29a; J.A. 64a).

Two weeks later and without prior warning, Local 140 placed pickets bearing the same sign in front of stores operated by the New York City firms of Wucker Furniture Co. and Finkenberg Furniture Co. (Pet. App. 29a; J.A. 67a, 74a, 82a). Like Modern, these two stores carried bedding which, except for that produced by U.S. Mattress, came almost solely from manufacturers whose employees were represented by Local 140 or a sister local (Pet. App. 27a; J.A. 69a–70a, 88a–89a).

When Sidney Wucker was unable to reach Sirota by telephone, he appealed for help to Frank Schaffer, business manager of the local that represented the sales employees of Wucker and Finkenberg (Pet. App. 29a; J.A. 70a, 83a). Schaffer talked to Sirota and subsequently, as a result of these conversations, Wucker told Schaffer that he would "remove the U.S. merchandise from our floor if he removed the pickets" (Pet. App. 29a; J.A. 85a, 116a). Fifteen minutes after Wucker made this promise, the picketing ceased and did not resume (Pet. App. 29a; J.A. 86a–87a). Similarly, at Finkenberg, the pickets ceased patrolling 15 minutes after Company President Nat Radelman promised Schaffer that he would "stop buying U.S. mattresses if he removed the pickets" (Pet. App. 29a; J.A. 73a–77a).

On the foregoing facts, the Board concluded that Local 140's picketing violated Section 8(b)(4)(B) of the Act. The Board found that an object of the

picketing was to force the picketed stores to cease doing business with manufacturers of bedding not under contract with Local 140, and specifically with U.S. Mattress (Pet. App. 30a). The Board further found that the picketing was aimed at inducing a generalized loss of patronage by the stores, and hence constituted a threat, restraint, and coercion within the meaning of subparagraph (ii) of Section 8(b)(4) (Pet. App. 34a–35a). The Board ordered Local 140 to cease and desist from the unfair labor practices found, and to post appropriate notices (Pet. App. 35a–37a). The court of appeals (with one judge dissenting) sustained the Board's findings and conclusions and enforced its order (Pet. App. 1a–23a).

ARGUMENT

Contrary to petitioner's contention (Pet. 6–9), this case does not present the broad issue whether, consistent with Section 8(b)(4)(ii)(B) of the National Labor Relations Act, a labor union may engage in so-called "work preservation picketing" of retail establishments designed to encourage customers of such establishments to purchase only union-made goods. As shown below, the Board found that the union's picketing here did not have that limited objective, but was more broadly designed to achieve a total boycott of the retail establishments and thereby force those establishments to terminate dealings with certain of their suppliers; and such broader purpose sufficed to bring the picketing within the ban of the Act. Thus, the correctness of the decision below basically turns upon questions of substantial evidence, and such factual issues do not warrant further review.

1. Section 8(b)(4)(ii)(B) of the Act makes it an unfair labor practice for a labor organization "to threaten, coerce, or restrain any person," for an object of forcing that person "to cease doing business with any other person." Petitioner argues that its picketing did not violate this section because the Union's "sole purpose was the preservation of work opportunities for the members of the picketing union" (Pet. 7), and it "sought only to encourage the purchase of certain merchandise in which it had a *bona fide* economic interest, not to boycott the retail establishment" (Pet. 8).[3] But the Board found (Pet. App. 30a, 35a), and the court below sustained its findings (Pet. App. 11a, 15a), that an object of the Union's picketing was to force the picketed stores to cease doing business with U.S. Mattress, and that the picketing was not confined to a particular product but sought a total boycott of the stores.

Under *National Labor Relations Board* v. *Fruit and Vegetable Packers & Warehousemen* (*Tree Fruits*), 377 U.S. 58, these findings were sufficient to support the Board's conclusion that the picketing was illegal.

[3] Contrary to petitioner's suggestion (Pet. 17–18), it is immaterial that there was no active labor dispute between Local 140 and U.S. Mattress, or between Local 140 and any other "non-union" manufacturer whose products it might also have desired to boycott. *Local 1976, United Brotherhood of Carpenters*, 113 NLRB 1210, 1211–1212, affirmed, 357 U.S. 93; *National Labor Relations Board* v. *Washington-Oregon Shingle Weavers' District Council*, 211 F. 2d 149, 152 (C.A. 9); *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters*, 242 F. 2d 932, 935 (C.A. 6); and see *National Maritime Union of America, AFL–CIO* v. *National Labor Relations Board*, 346 F. 2d 411, 416–420 (C.A.D.C.).

In *Tree Fruits*, the Court held that picketing of a neutral retail store, which merely requested the customers not to purchase identified products which the store obtained from an employer with whom the union had a primary labor dispute, did not constitute a threat, restraint or coercion within the meaning of Section 8(b)(4)(ii)(B); but that picketing which sought a boycott of the store's entire business did violate that section (377 U.S. at 63, 70–71). The Board's findings show that the picketing here had the latter rather than the former objective, and thus petitioner's basic challenge to the Board's decision is an attack on the sufficiency of the evidence (see Pet. 7, 13–19).

2. There is adequate evidentiary support for the Board's findings. The finding that U.S. Mattress was the target of Local 140's boycott activities was justified by the following subsidiary facts: (a) the initial complaint of Union Agent Carrion to Mrs. Leiboff that Modern "carried too much U.S. Mattress"; (b) his accompanying explanation that "U.S. Mattress doesn't belong to our union"; (c) the explanation by President Sirota of Local 140 to Modern's co-owner, Portnoy, that the reason for the picketing was that Modern was "carrying nonunion brand merchandise"; and (d) the fact that picketing of each retailer ceased shortly after it promised to discontinue its purchases of U.S. Mattress products (Pet. App. 30a).[4]

[4] Contrary to petitioner's assertion (Pet. 12), there is no conflict between the decision of the court below and *National Labor Relations Board* v. *Upholsterers Frame & Bedding Workers*, 331 F. 2d 561 (C.A. 8). In that case, the union, at the same time it picketed, passed out leaflets giving the names of local

The Board was equally warranted in finding that the Union's appeal in picketing was not limited to U.S. Mattress products but was intended to induce a generalized customer boycott of the retail stores (Pet. App. 34a–35a). As the court below noted (Pet. App. 15a), Local 140 made a broad-gauged appeal to "look for [its] union label," even though it was aware that union labels were not attached to products shipped by its own unionized manufacturers. Since the lack of a label thus did not indicate non-union merchandise, Local 140's picketing appeal could not help but broaden the boycott to products other than those manufactured by U.S. Mattress, the manufacturer who was the object of its efforts. Furthermore, as the court added (*ibid.*), the picket "signs asked customers not to buy non-union 'furniture, upholstery & bedding,' a far broader appeal than required to boycott the products of U.S. Mattress, a bedding manufacturer only."

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manufacturers whose products consumers were encouraged to purchase. Furthermore, that case was decided by the Board prior to this Court's *Tree Fruits* decision, and the Eighth Circuit concluded that the Board's decision rested on the erroneous premise that "peaceful consumer picketing in front of a secondary establishment is *per se* illegal under the Act" (*id.* at 563). *Big Apple Supermarkets, Inc.* v. *Dutto*, 237 F. Supp. 774 (E.D. N.Y.), cited by petitioner (Pet. 12), is likewise inapposite because there the pickets apparently specifically requested customers not to buy the products of Gourmet Company.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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